Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

MATTHEW COOPER AND TIME INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The D.C. Circuit upheld grand jury subpoenas and contempt citations seeking to compel TIME magazine reporter Matthew Cooper and Time Inc. to reveal confidential source information regarding an alleged leak by government officials identifying Valerie Plame as a CIA operative.

Reflecting the conflict and confusion over whether the courts should recognize a reporter's confidential source privilege under Federal Rule of Evidence 501—or whether they even have the power to do so in light of this Court's decision in *Branzburg v. Hayes*—the three panel members below offered three different analyses of these issues, while agreeing that *Branzburg* precluded them from recognizing a First Amendment-based privilege.

The panel ultimately declined to quash the subpoenas based on information contained in secret evidence submitted by the prosecutor and considered *ex parte*.

The following questions are presented:

1. Whether a reporter's privilege exists under Federal Rule of Evidence 501 and the common law, or under the First Amendment, that provides protection against compelled disclosure of confidential source information.

2. Whether the Due Process Clause provides protection against imprisonment or fines for contempt based on secret evidence presented *ex parte* by a prosecutor.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the consolidated proceeding below included Matthew Cooper, Time Inc., Judith Miller, and the United States of America.

Time Inc., the publisher of TIME magazine, is wholly owned by Time Warner Inc., a public company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Matthew Cooper and Time Inc. ("Time") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS AND ORDERS BELOW

The D.C. Circuit's opinion (Pet. App. 1a) is reported at 397 F.3d 964, and its order denying rehearing en banc (Pet. App. 116a) is reported at ___ F.3d ___, 2005 WL 889719. Orders of the district court are reported at 332 F. Supp. 2d 26 (Pet. App. 86a), 332 F. Supp. 2d 33 (Pet. App. 98a), 338 F. Supp. 2d 16 (Pet. App. 101a), and 346 F. Supp. 2d 54 (Pet. App. 111a).

JURISDICTION

The D.C. Circuit filed its opinion on February 15, 2005, and denied petitioners' timely request for rehearing en banc on April 19, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Evidence 501 provides: "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."

The Fifth Amendment's Due Process Clause provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This case presents important, substantial and recurring questions concerning the reporter's privilege that have confused and divided courts throughout the country since this Court's 5-4 decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), more than thirty years ago.

1. In the summer of 2003, a public controversy arose over the justification for the invasion of Iraq, including whether Iraq possessed, or had been seeking to develop, weapons of mass destruction. In the midst of that controversy, on July 6, 2003, the *New York Times* published an op-ed piece by former Ambassador Joseph Wilson challenging the Bush Administration's justifications for the invasion. Wilson asserted that the CIA had dispatched him to Niger in February 2002 to investigate whether Iraq had attempted to purchase uranium from Niger as part of its effort to develop nuclear weapons. He stated that he had found no credible evidence of such efforts, and had reported that conclusion to the CIA. *See* Joseph C. Wilson, *What I Didn't Find in Africa*, N.Y. TIMES, July 6, 2003, § 4, at 9.

On July 14, 2003, the *Chicago Sun-Times* published a column by Robert Novak reporting that "two senior administration officials" had told him that the CIA had selected Wilson for the Niger mission at the suggestion of Wilson's wife, Valerie Plame, described by Novak as "an agency operative on weapons of mass destruction." Robert Novak, *The Mission to Niger*, CHI. SUN-TIMES, July 14, 2003, at 31.

Three days later, TIME magazine published an article on its website, co-authored by reporter Matthew Cooper, stating that "some government officials have noted to TIME in interviews . . . that Wilson's wife, Valerie Plame, is a CIA official who monitors the proliferation of weapons of mass destruction." Matthew Cooper *et al.*, *A War on Wilson?*, TIME.com (July 17, 2003), available at www.time.com/time/nation/article/0,8599,465270,00.html. The article, based in part on confidential sources, suggested potential misconduct by government officials in that the leak may have been made to re-

taliate against and discredit Wilson for his op-ed in the *Times*. Cooper later contributed reporting to a second article, also based in part on confidential sources, that reported on the Iraq/uranium controversy but did not mention Plame. Michael Duffy *et al.*, *A Question of Trust*, TIME, July 21, 2003, at 22.

2. The Department of Justice opened an investigation into whether the leak of Plame's identity to the media violated federal law barring certain unauthorized disclosures of the identity of covert operatives. *See* 50 U.S.C. § 421 (criminalizing the intentional and knowing disclosure of information identifying a covert agent by anyone having authorized access to classified information, with knowledge that the United States is taking affirmative measures to conceal that covert agent's intelligence relationship to the United States). In December 2003, the Attorney General recused himself from that investigation and delegated that responsibility to the Deputy Attorney General. The Deputy Attorney General, in turn, appointed Patrick Fitzgerald as Special Counsel and delegated to him the full authority of the Attorney General over the investigation.

The Special Counsel convened a grand jury in January 2004, and on May 21, 2004, issued a grand jury subpoena to Cooper seeking his testimony and production of "[a]ll notes, tape recordings, e-mails, or other documents of Matthew Cooper relating to the July 17, 2003 Time.com article entitled, 'A War on Wilson?' and the July 21, 2003 Time magazine article entitled, 'A Question of Trust.'" A21.[1]

3. Cooper moved to quash the subpoena, invoking a reporter's privilege under the common law and First Amendment, and arguing that the subpoena sought to force him to reveal the identity of his confidential source or sources and other information provided in confidence. A61. In an affidavit he stated that his ability to obtain and report informa-

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1 "A" refers to the Appendix filed in the D.C. Circuit.

tion to the public depended in large part on his ability "to promise confidentiality to [his] sources." Pet. App. 126a.

In a July 20, 2004 opinion, the district court denied Cooper's motion, concluding that *Branzburg* "rejected any reporter's privilege rooted in the First Amendment or common law in the context of a grand jury acting in good faith." Pet. App. 86a. The court also stated that the Special Counsel "would be able to meet even the most stringent of balancing tests," based solely on an affidavit that the Special Counsel had submitted *ex parte* and under seal. Pet. App. 97a. The Special Counsel refused to share the affidavit with Cooper or his counsel, and the district court denied Cooper's request that he or his counsel be permitted to review it.

The Special Counsel had served a substantially similar subpoena on Time, requesting the same documents sought from Cooper. Time moved to quash, and the district court denied Time's motion on August 6, 2004.

Cooper and Time informed the Special Counsel that they would decline to comply with the subpoenas insofar as they sought testimony or documents that would identify confidential sources. On August 9, 2004, the court issued an order holding Cooper and Time in contempt. Pet. App. 98a. The court directed that Cooper be imprisoned for up to 18 months, and that Time pay a fine of $1,000 per day, until they complied with the subpoenas. *Id.* at 100a.

Cooper and Time noticed appeals, but shortly thereafter reached an agreement with the Special Counsel whereby Time agreed to produce certain documents and Cooper agreed to answer certain questions pertaining to his conversations with a particular individual. (Cooper and Time reached this agreement only after that individual had explicitly and unambiguously informed Cooper that he had no objection to Cooper identifying him.) On August 23, 2004, Cooper answered all questions from the Special Counsel in a deposition and Time produced the documents. On the Special Counsel's motion, the district court then vacated the contempt orders.

4. Less than three weeks later, the Special Counsel served a second round of subpoenas on Cooper and Time. These subpoenas were broader than the initial subpoenas, and sought all documents "reflecting conversations between Matthew Cooper and official source(s) prior to July 14, 2003" relating to Wilson, Plame, or her affiliation with the CIA—whether or not those documents related to the two articles in question. A314-15. Cooper and Time again moved to quash based on the reporter's privilege. On October 7, 2004, the district court denied the motions and ordered Cooper and Time to comply.[2]

Cooper and Time advised the Special Counsel that they would not comply insofar as the subpoenas sought information that would divulge the identity of confidential sources. On October 13, 2004, the court held Cooper and Time in contempt and once again ordered Cooper to be imprisoned up to 18 months, and Time to be fined $1,000 per day, until they complied with the subpoenas. The court adhered to its earlier ruling, holding that *Branzburg* foreclosed any claim of privilege, either under the First Amendment or federal common law. Finding that Cooper's and Time's appeals "are brought in good faith and raise substantial issues of law," the court granted Cooper bail and stayed the fine imposed on Time pending appeal. Pet. App. 109a.

5. The Special Counsel was simultaneously seeking to force disclosure of confidential source information from *New York Times* reporter Judith Miller.[3] The grand jury subpoenas issued to Miller on August 12 and 14, 2004, demanded her confidential source information relating to Valerie Plame or Iraqi efforts to obtain uranium. As with Cooper and Time,

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[2] On November 10, 2004, the district court issued an opinion explaining that the motion was denied for the reasons given in the July 20, 2004 and September 9, 2004 orders, among other reasons. Pet. App. 111a.

[3] The Special Counsel also caused grand jury subpoenas to be issued to several other reporters in connection with this investigation, including Tim Russert of NBC and Walter Pincus and Glenn Kessler of the *Washington Post*.

the district court rejected Miller's reporter's privilege claims and denied her motion to quash. In a September 9, 2004 order, the court adopted and relied upon the reasoning of its July 20, 2004 order in rejecting the privilege. Pet. App. 101a. The court included a more detailed explanation of its reasons for rejecting a common law privilege, concluding that because the *Branzburg* Court supposedly "undertook the analysis" in 1972 and did not recognize a common law privilege, the district court was foreclosed from doing so today. Pet. App. 105a.

As with Cooper and Time, the court held Miller in contempt and ordered her to be jailed when she refused to comply with the subpoenas. The court granted bail to Miller, specifically finding that an appeal would be brought in good faith and would raise substantial issues of law.

6. Cooper, Time, and Miller brought a consolidated appeal. A panel of the D.C. Circuit, composed of Judges Sentelle, Henderson and Tatel, affirmed. Pet. App. 2a. The court interpreted *Branzburg* as an absolute bar to any First Amendment protection for confidential sources, rejected decisions from other circuits that have recognized a First Amendment privilege, and held that because "[t]he Supreme Court has not overruled *Branzburg*," it "has already decided the First Amendment issue before us today." Pet. App. 10a, 16a. Only the Supreme Court has "the prerogative of overruling its own decisions." Pet. App. 16a (quotation omitted).

The panel could not reach a similar consensus on whether a reporter's privilege existed as a matter of federal common law, splintering three ways in separate concurrences totaling 60 pages. Judge Sentelle stated that, in his opinion, *Branzburg* rejected a common law privilege and "that rejection stands unless and until the Supreme Court itself" clarifies or overrules *Branzburg*. Pet. App. 26a.

Judge Henderson stated that "I cannot agree with Judge Sentelle's conclusion that the United States Supreme Court has answered the question" whether a common law privilege exists. Pet. App. 38a. She noted that this Court's opinion in

Branzburg, as well as Justice Powell's concurrence, "hint ambiguously at the existence" of a common law privilege, and emphasized that "we are not bound by *Branzburg*'s commentary on the state of the common law in 1972." *Id.* at 38a-39a. Nonetheless, she concluded that because the Special Counsel's *ex parte* "evidentiary proffer overcomes any hurdle, however high, a federal common-law reporter's privilege may erect," the court "need not, and therefore should not, decide anything more today than that." *Id.* at 35a.

Judge Tatel disagreed with both Judge Sentelle and Judge Henderson. He explained that he found *Branzburg* "more ambiguous than do my colleagues" and stated that he would recognize a common law privilege, rejecting the district court's and Judge Sentelle's argument that "*Branzburg* already performed the analysis required by Rule 501" of the Federal Rules of Evidence. Pet. App. 45a, 58a. Judge Tatel noted "the shift in favor of the privilege since [*Branzburg* was decided]—from seventeen states with statutory privileges then to thirty-one plus D.C. today, with another eighteen providing common law protection," and concluded that "[t]o disregard this modern consensus in favor of decades-old views . . . would not only imperil vital newsgathering, but also shrink the common law function assigned by Rule 501 and 'freeze the law of privilege' contrary to Congress's wishes." *Id.* at 59a, 62a (quoting *Trammel v. United States*, 445 U.S. 40, 47 (1980)). He set forth his formulation of the reporter's privilege, and concluded that it would be overcome in this case, based solely on the prosecutor's *ex parte* submission. Pet. App. 62a-83a.

The panel as a whole noted the differing views of each panel member as to the existence and scope of a common law privilege, but concluded that "if [a common law] privilege applies here, it has been overcome" by the Special Counsel's secret evidentiary proffer. Pet. App. 16a. The panel stated that on this point it was adopting the reasoning of Judge Tatel's concurring opinion, which devoted eight pages to explaining how the Special Counsel, with his "voluminous classified filings," had "met his burden of demonstrating that

the information [sought from the reporters] is both critical and unobtainable from any other source." Pet. App. 16a, 75a. Those eight pages, as released to petitioners and to the public, are blank. Pet. App. 76a-82a.

Finally, the court held that Cooper's and Time's due process rights had not been violated by "the refusal of the Special Counsel and the District Court to provide them access to the Special Counsel's secret evidentiary submissions." Pet. App. 17a. The court concluded that the government's interest in grand jury secrecy outweighed any rights an alleged contemnor may have to respond to the evidence purporting to defeat a claim of privilege. *Id.* at 17a-18a.[4]

With two of the nine active judges not participating, the court of appeals denied rehearing en banc. Pet. App. 116a-117a. Judge Tatel issued a separate statement concurring in the denial, acknowledging that "this court's decisions concerning [*Branzburg*] are somewhat conflicted," but concluding that "[o]nly the Supreme Court can limit or distinguish *Branzburg* on these facts," and that no other issue warranted the full court's review. Pet. App. 118a-119a.

REASONS FOR GRANTING THE WRIT

The four separate opinions issued by the D.C. Circuit's three-judge panel are a microcosm of the law in this area, which is undeniably in serious disarray. This Court's guidance is necessary to determine the existence and scope of a reporter's privilege under the common law and the First Amendment.

This Court has not considered the issue whether federal law provides protection for confidential sources since its sharply divided and perplexing decision more than 30 years ago in *Branzburg v. Hayes*, 408 U.S. 665 (1972). Since that time, the *Branzburg* majority opinion and Justice Powell's

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[4] The court also rejected petitioners' arguments that the Department of Justice Guidelines for issuing subpoenas to reporters, 28 C.F.R. § 50.10, were judicially enforceable and thus declined to reach the issue whether the Special Counsel had complied with them. Pet. App. 20a.

"enigmatic" concurrence have been subject to sharply differing interpretations. The courts of appeals have been vexed by whether there is any common law or constitutional privilege at all, and how to apply the privilege in varying contexts. Some courts have found *Branzburg* to bar recognition of a privilege, while many have read the collection of opinions affirmatively to support it, and still others have held that the privilege applies in some proceedings but not others.

The intervening three decades have witnessed significant changes in the legal landscape that strongly support recognition of a federal reporter's privilege. In 1975, Congress adopted Federal Rule of Evidence 501, instructing federal courts to recognize new privileges as appropriate in light of "reason and experience." In embracing this flexible approach, Congress declined to adopt the privilege rule originally promulgated by this Court—which had set forth nine specific, enumerated privileges—in favor of an open-ended grant of lawmaking authority that "directed federal courts to 'continue the evolutionary development of testimonial privileges.'" *Jaffee v. Redmond*, 518 U.S. 1, 8-9 (1996) (quoting *Trammel*, 445 U.S. at 47).

Moreover, at the time *Branzburg* was decided—in the pre-Watergate era—only 17 States recognized a reporter's privilege. Today, 49 States and the District of Columbia do. This fact is highly relevant to the question whether a federal common law privilege should be recognized under Rule 501. As this Court held in *Jaffee*, which itself was decided more than 20 years after *Branzburg*, "the existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege." 518 U.S. at 9.

The sharp disagreements among the lower courts, and the many changes in the law over the last 30 years, have resulted in inconsistent and conflicting legal standards throughout the country. This uncertainty, in turn, frustrates and defeats the nearly unanimous policies of the States in this area. It also leads to confusion by sources and reporters, and the specter of jail and other harsh penalties for reporters who

do not know what promises they can make to their sources when engaged in newsgathering.

Confidential sources are critical to reporting on matters of public importance. This case, for example, involves a news story about the validity of the government's justification for war in Iraq, and alleged misconduct by senior officials aimed at discrediting critics of the war. Yet in recent months there has been a wave of reporters being subpoenaed and held in contempt for declining to reveal their sources. For example, a Rhode Island television reporter was held in civil and criminal contempt for refusing to disclose to a grand jury the source of a leak, and five reporters were held in contempt in connection with the Wen Ho Lee civil case. *See* Reporters' Committee for Freedom of the Press, *Special Report: Reporters and Federal Subpoenas*, March 2005, available at www.rcfp.org/shields_and_subpoenas.html.

As the panel in this case recognized, only this Court can resolve the reigning conflict and confusion among the federal courts regarding *Branzburg* and the existence and scope of a reporter's privilege. The Court should grant review and do so in this case.

The Court should also grant review to resolve the important due process questions presented by the lower courts' reliance on the prosecutor's *ex parte* submissions in holding Cooper and Time in contempt. The D.C. Circuit's holding—that a witness may be imprisoned based on secret evidence—conflicts with rulings from the Second and Ninth Circuits, as well as decisions of this Court recognizing the due process right of defendants to review and challenge the evidence against them.

I. THE QUESTION WHETHER A FEDERAL REPORTER'S PRIVILEGE EXISTS IS IMPORTANT, RECURRING, HAS DIVIDED THE CIRCUITS, AND WARRANTS REVIEW.

In *Branzburg*, this Court, by a 5-4 vote, declined to recognize a reporter's privilege under the First Amendment in a

case involving reporters subpoenaed by a grand jury. The Court, in an opinion authored by Justice White, recognized that "news gathering is not without its First Amendment protections," 408 U.S. at 707, but went on to reject protection in that case. Although the Court noted that, as of 1972, no privilege had been recognized "[a]t common law," it obviously could not have resolved the question whether such a privilege should be recognized under Rule 501, which would not be enacted for another three years. *Id.* at 685-86, 693. In fact, the Court specifically observed that "[a]t the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate." *Id.* at 706. The Court emphasized that its analysis was based "[o]n the records now before us" at a time when "the majority" of States had not "provided newsmen a statutory privilege." *Id.* at 689-90.

In a concurring opinion, however, Justice Powell—whose vote was essential to the judgment—seemed to endorse some form of privilege by recommending "the striking of a proper balance between freedom of the press" and the needs of law enforcement. 408 U.S. at 710. Justice Stewart's dissent described Justice Powell's opinion as "enigmatic," *id.* at 725, and the lower courts are deeply split over whether it should be construed to limit—or even replace—the majority's holding, compounding the confusion over *Branzburg*'s meaning and scope. *See, e.g.*, *McKevitt v. Pallasch*, 339 F.3d 530, 531-32 (7th Cir. 2003) ("[s]ince the [four] dissenting Justices would have gone further than Justice Powell in recognition of the reporter's privilege, and preferred his position to that of the majority opinion . . ., maybe his opinion should be taken to state the view of the majority of the Justices—though this is uncertain, because Justice Powell purported to join Justice White's 'majority' opinion"). Some courts and commentators have even gone so far as to label Justice White's opinion in *Branzburg* a "plural-

ity," while others have noted that Justice Powell joined that opinion despite writing a concurrence that seemed to question its fundamental conceptual underpinnings.[5] As Justice Stewart wrote three years after *Branzburg*, "the Court rejected the [reporters'] claims by a vote of five to four, or, considering Mr. Justice Powell's concurring opinion, perhaps by a vote of four and a half to four and a half." Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 635 (1975).

Branzburg ignited a remarkable 33-year nationwide judicial debate that is ripe for this Court's resolution. What Judge Tatel termed the "internal confusion" of *Branzburg*, Pet. App. 47a, has resulted in courts taking wildly diverging approaches to the reporter's privilege. Many courts have recognized a common law privilege and, in some cases, a First Amendment privilege in the criminal context despite *Branzburg*. *See, e.g., In re Grand Jury Subpoena to Williams*, 766 F. Supp. 358 (W.D. Pa. 1991), *aff'd by an equally divided court*, 963 F.2d 567 (3d Cir. 1992) (en banc). Other courts have reached the opposite conclusion, agreeing with Judge Sentelle's view that *Branzburg* forecloses a common law privilege as well as a First Amendment privilege. *See, e.g., In re Grand Jury Proceedings*, 5 F.3d 397, 399 (9th Cir. 1993). Still other courts have recognized the privilege in the civil context, while rejecting it in the criminal context.

Judge Posner recently surveyed the confused state of the law in *McKevitt v. Pallasch*, where he noted that "[a] large number of cases conclude, rather surprisingly in light of *Branzburg*, that there is a reporter's privilege, though they do not agree on its scope." 339 F.3d at 532. At the same time,

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[5] The confusion generated by Justice Powell's concurrence has persisted for more than three decades now, and shows no signs of abating, as courts cannot agree on Justice Powell's exact position, and how (if at all) it modifies Justice White's opinion for the Court. *Compare, e.g., United States v. Smith*, 135 F.3d 963, 968-69 (5th Cir. 1998) ("we have previously construed *Branzburg* as a plurality opinion") with *In re Grand Jury Proceedings*, 5 F.3d 397, 400 (9th Cir. 1993) ("It is important to note that [*Branzburg*] is *not* a plurality opinion.").

other courts "refuse to recognize the privilege, at least in cases . . . that involve grand jury inquiries." *Id.* This bafflement over *Branzburg* has been noted time and again. *See, e.g.*, *New York Times Co. v. Gonzales*, No. 04-7677, 2005 WL 427911, at *31 (S.D.N.Y. Mar. 2, 2005) ("the proper interpretation of *Branzburg* is an issue that has divided those circuits that have had occasion to consider it").

Guidance from this Court is needed to resolve the many circuit splits involving *Branzburg*, and the general confusion in the lower courts concerning the existence and scope of a reporter's privilege under the common law and the First Amendment. Whatever the intended meaning of *Branzburg*, the lower courts have been interpreting the decision, and Justice Powell's concurrence, in radically, intolerably different ways, resulting in a patchwork of inconsistent and conflicting legal standards that—as the panel below recognized—only this Court can resolve. *See* Pet. App. 27a & n.3 (Sentelle, J., concurring) ("I think [the common law privilege] argument should appropriately be made to the Supreme Court" as "it is only the High Court and not this one that may act upon that argument."); *id.* at 49a (Tatel, J., concurring) ("if *Branzburg* is to be limited or distinguished in the circumstances of this case, we must leave that task to the Supreme Court"). These issues have now reached the boiling point and warrant resolution by this Court.

A. This Court Should Resolve The Conflicts And Recognize A Common Law Privilege.

Since *Branzburg* was decided in 1972, the law in this area has changed dramatically. Congress enacted Federal Rule of Evidence 501; this Court decided *Jaffee* and established a framework for recognizing new common law privileges under Rule 501; and there has developed an overwhelming consensus among the States to enshrine the reporter's privilege in statutes or through judicial decision.

Rule 501 "authorizes federal courts to define new privileges by interpreting 'common law principles . . . in the light of reason and experience.'" *Jaffee v. Redmond*, 518 U.S. 1, 8

(1996). As this Court has explained, "'the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions.'" *Id.* (quoting *Funk v. United States*, 290 U.S. 371, 383 (1933)). Congress, in promulgating Rule 501, "did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to 'continue the evolutionary development of testimonial privileges.'" *Jaffee*, 518 U.S. at 8-9 (quoting *Trammel*, 445 U.S. at 47). Courts have followed this congressional mandate and recognized many privileges under Rule 501, including the psychotherapist privilege, the spousal privilege, the settlement privilege, the cleric-communicant privilege, the military secrets privilege, and many others.

1. The Circuits Have Adopted Inconsistent And Conflicting Approaches To A Common Law Reporter's Privilege.

In the decision below, each panel member reached a different conclusion on the common law privilege question. Relying largely on *Branzburg*, Judge Sentelle concluded that no privilege existed and suggested that this Court's guidance may be needed; Judge Tatel would have recognized a qualified privilege; and Judge Henderson, while disagreeing with Judge Sentelle that *Branzburg* foreclosed recognition of a common law privilege, declined to resolve the question. Pet. App. 16a ("the Court is not of one mind on the existence of a common law privilege"). The differing conclusions of the three panel members reflect the confusion in the lower courts, which are divided over the existence and scope of a common law reporter's privilege.

The Third Circuit, for example, has recognized the privilege in civil cases, *see Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979) ("journalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources"), as well as in criminal trials. *See United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980) ("journalists have a federal common-law qualified privilege arising under Fed. R.

Evid. 501 to refuse to divulge their confidential sources"). Courts within the Third Circuit have also recognized the privilege in the grand jury context. *See In re Grand Jury Subpoena to Williams*, 766 F. Supp. 358, 371 (W.D. Pa. 1991) (finding a "qualified news gatherer's privilege against compelled disclosure of his or her news sources in a Grand Jury proceeding"), *aff'd by an equally divided court*, 963 F.2d 567 (3d Cir. 1992) (en banc).

The Ninth Circuit, on the other hand, has held that there is no reporter's privilege in cases involving grand jury subpoenas. In *In re Grand Jury Proceedings*, 5 F.3d 397, 399 (9th Cir. 1993), a graduate student refused to testify before a grand jury, asserting a "scholar's privilege" that the court described as "akin to that of a reporter." The court rejected the privilege, explaining that "*Branzburg* cast doubt on [its] ability to recognize a news gathering privilege in the grand jury context as a matter of common law." *Id.* at 402-03.

The Second Circuit has "long recognized the existence of a qualified privilege for journalistic information" in civil cases, although its decisions "have expressed differing views on whether the journalists' privilege is constitutionally required, or rooted in federal common law." *Gonzales v. National Broad. Co.*, 194 F.3d 29, 36 & n.6 (2d Cir. 1999). District courts within the circuit have applied the privilege in cases involving grand jury subpoenas. In *New York Times v. Gonzales*, 2005 WL 427911 (S.D.N.Y. Mar. 2, 2005), the court expressly recognized a common law reporter's privilege in the grand jury context—notably, in another case involving Mr. Fitzgerald's attempted use of subpoenas to force Judith Miller to disclose confidential sources. The court held that *Branzburg* "do[es] not preclude this Court from finding a federal common law privilege to have developed in the decades since *Branzburg* was issued" and that "[t]o conclude otherwise would be contrary to the mandate of Rule 501 and the congressional intent underlying that Rule." *Id.* at *43.

For its part, the Fourth Circuit appears to recognize a qualified reporter's privilege in civil cases. *See United States*

v. Steelhammer, 539 F.2d 373, 376-77 & n.* (4th Cir. 1976) (Winter, J., dissenting) (applying balancing test based on Justice Powell's *Branzburg* concurrence and stating that "[u]nder Federal Rule of Evidence 501, [reporters] should be afforded a common law privilege not to testify in civil litigation between private parties"), *rev'd*, 561 F.2d 539 (4th Cir. 1977) (en banc order adopting position of Judge Winter).

Finally, the First Circuit has taken inconsistent and confusing positions. *Compare Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 596 (1st Cir. 1980) (quoting with approval the Third Circuit's holding in *Riley* that "'journalists have a federal common law privilege, albeit qualified, to refuse to divulge their sources'" and that "the flexibility of Rule 501 left ample room for the development of a finely honed, 'ad hoc' approach") *with United States v. LaRouche Campaign*, 841 F.2d 1176, 1178 n.4 (1st Cir. 1988) (rejecting argument that "a federal common law privilege [exists] wholly apart from the First Amendment").

These conflicts cannot be avoided by trying to distinguish this case because it arises in the grand jury context. There is no privilege known to law that varies depending on the nature of the legal proceeding in which it is asserted, and, in fact, Federal Rule of Evidence 1101(c) expressly provides that "[t]he rule with respect to privileges applies *at all stages* of *all actions*, cases, and proceedings" (emphases added). *See also* FED. R. EVID. 1101(d)(2) (providing that Federal Rules of Evidence do not apply to grand jury proceedings "other than with respect to privileges"); *United States v. Calandra*, 414 U.S. 338, 346 (1974) ("[A grand jury] may consider incompetent evidence, but it may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law.") (citing *Branzburg*).

2. *Jaffee* And Rule 501 Support The Recognition Of A Common Law Privilege.

This Court's analysis in *Jaffee* strongly supports recognition of a common law reporter's privilege under Rule 501. In *Jaffee*, the Court recognized a psychotherapist-patient privi-

lege, applicable to social workers, by reference to three factors: (1) whether such a privilege is widely recognized by the States; (2) whether the proposed privilege serves significant public and private interests; and (3) whether recognition of those interests outweighs the burden on truth-seeking that might be imposed by the privilege.

Each *Jaffee* factor supports recognition of a reporter's privilege. *First*, the reporter's privilege is overwhelmingly recognized by the States. Whereas the *Branzburg* Court noted that the majority of the States had not recognized the privilege as of 1972, forty-nine States, as well as the District of Columbia, have now recognized a reporter's privilege. Pet. App. 59a (Tatel, J., concurring) (emphasizing "the shift in favor of the privilege" since *Branzburg*). Thirty-one of these States and the District of Columbia have done so by enacting statutes, commonly referred to as "shield laws." *See, e.g.*, D.C. Code Ann. §§ 16-4701 *et seq*. The remainder have done so by judicial decision. To be sure, the precise scope of the privilege differs from State to State, but the *Jaffee* Court recognized that such limited "variations in the scope of the protection" cannot "undermine the force" of the States' judgment that some form of privilege is warranted. 518 U.S. at 14 n.13.

Jaffee further recognized that because "any State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court," the "[d]enial of the federal privilege . . . would frustrate the purposes of the state legislation that was enacted to foster these confidential communications." 518 U.S. at 13 (footnote omitted). So too here: any State's promise of confidentiality has little value if the source and reporter cannot rely with a high degree of certainty on the fact that the privilege will also be honored in federal court. But right now, federal law is highly uncertain and unpredictable, effectively nullifying state-law protections.

Second, freedom of the press furthers important public and private interests and was established "not for the benefit

of the press so much as for the benefit of all of us." *Time Inc. v. Hill*, 385 U.S. 374, 389 (1967). As this Court has recognized, the press "has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences." *Estes v. Texas*, 381 U.S. 532, 539 (1965). The First Amendment freedoms at stake—and the undeniable importance of a free press to an informed citizenry—are at least as important as the mental health interests at issue in *Jaffee*.

In performing this public function, journalists often must rely on promises of confidentiality to their sources. In many cases this is the only way they can obtain and report information of great public interest. Throughout the nation's history, confidential communications to reporters have resulted in news stories of the greatest public importance, with Watergate perhaps the most famous example. If prosecutors can invoke the power of the courts to compel reporters to reveal their confidential sources, such forced disclosure "would dam the flow to the press, and through it to the people, of the most valuable sort of information: not the press release, not the handout, but the firsthand story based on the candid talk of a primary news source." A. Bickel, *The Morality of Consent*, at 84 (1975). *See also Branzburg*, 408 U.S. at 693 ("The argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational."); *Cuthbertson*, 630 F.2d at 147 ("The compelled production of a reporter's resource materials can constitute a significant intrusion into the newsgathering and editorial processes."); Affidavits of Matthew Cooper, Judith Miller, Scott Armstrong and Jack Nelson (Pet. App. 123a, 130a; A287, A433 and A445). Reason and experience thus demonstrate that a reporter's privilege serves powerful public and private interests. Pet. App. 51a (Tatel, J., concurring).

Third, these important interests outweigh any likely evidentiary benefits that would result from denial of the privilege. As this Court explained in *Jaffee*:

> If the [psychotherapist's] privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled. . . . Without a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being. This unspoken "evidence" will therefore serve no greater truth-seeking function than if it had been spoken and privileged.

518 U.S. at 11-12. *See also Swidler & Berlin v. United States*, 524 U.S. 399, 407-08 (1998) ("the loss of evidence admittedly caused by the [attorney-client] privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place").

The same is true regarding the reporter's privilege. "Unless potential sources are confident that compelled disclosure is unlikely, they will be reluctant to disclose any confidential information to reporters." *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981). In short, given the amount of "evidence" that is "unlikely to come into being" absent a reporter's privilege, "the likely evidentiary benefit that would result from the denial of the privilege is modest." *Jaffee*, 518 U.S. at 11, 24. The majority of jurisdictions have been applying a form of reporter's privilege since *Branzburg*, with no discernible effect on law enforcement.

The court below erred, and misapplied *Jaffee*, in declining to recognize a common law privilege. Judge Sentelle concluded that *Branzburg* "rejected a common law privilege" and stated that "[i]n my view that rejection stands unless and until the Supreme Court itself overrules that part of *Branzburg*." Pet. App. 26a. But *Branzburg* dealt only with the First Amendment issue, *see* Pet. App. 69a (Tatel, J., concurring), and the view that the common law is frozen *circa* 1972 cannot be reconciled with Rule 501, *Jaffee* and *Trammel*, all of which emphasize that Congress intended the common law to be evolutionary and that new privileges can and should be recognized over time. In fact, Judge Hender-

son specifically rejected Judge Sentelle's conclusion, explaining that "we are not bound by *Branzburg*'s commentary on the state of the common law in 1972." Pet. App. 38a.

3. This Court Should Grant Review To Resolve The Tension Between *Branzburg* And *Jaffee*.

To the extent it can be interpreted to analyze the common law issue, the Court's analysis in *Branzburg* contradicts its analysis twenty-four years later in *Jaffee*. In *Branzburg*, the Court concluded that newsgathering was of constitutional importance and deserved protection, but found it "uncertain" whether there truly would be any consequent "burden on news gathering" if it declined to establish a clear and specifically delineated constitutional privilege. 408 U.S. at 690-91. The Court effectively demanded empirical proof that the lack of such a privilege would deter confidential communications. *Id.* at 690-91, 693. The four *Branzburg* dissenters believed the Court was demanding far too much in the way of proof. *Id.* at 733, 735-36 (Stewart, J., dissenting).

In *Jaffee*, however, the Court made clear that the burden is far less demanding under Rule 501. The Court was content to rest on the prospect that "the *mere possibility* of disclosure may impede development of the confidential relationship" between a psychotherapist and her patient. *Jaffee*, 518 U.S. at 10 (emphasis added); *cf. id.* at 24 (Scalia, J., dissenting) (criticizing majority for not requiring enough evidence that potential disclosure would chill communications). As noted above, many courts in the years since *Branzburg* have concluded that compelling journalists to disclose information obtained from confidential sources *does* harm the flow of information from sources to journalists and, through journalists, to the public, and the record on these points stands clear and unrebutted in this case, making it an ideal vehicle for resolving these issues. *See* Reporters' Affidavits at Pet. App. 123a, 130a; A287, A433 and A445).

In short, while courts are citing *Branzburg* as authority to reject a common law privilege, *Branzburg*'s analysis has

been superseded by *Jaffee*'s approach. The Court should grant review to reconcile these decisions.

B. This Court Should Resolve The Conflicts And Clarify *Branzburg* By Recognizing That The First Amendment Provides Protection For Confidential News Sources.

The same conflicting morass engulfing a common law privilege exists regarding a First Amendment privilege. Although the courts below held that *Branzburg* resolved this question, many courts disagree and have recognized a First Amendment protection against the compelled disclosure of confidential sources. Moreover, this Court's more recent First Amendment decisions undermine *Branzburg* and strongly support recognition of First Amendment protection, as well as a common law privilege, in these circumstances.

1. Courts Have Divided Over The Meaning Of *Branzburg* And The Scope Of A First Amendment Privilege.

The overwhelming majority of courts have interpreted *Branzburg* as recognizing some form of reporter's privilege under the First Amendment. The panel in this case, however, was unanimous in rejecting a First Amendment privilege—a result it believed was compelled by *Branzburg* and one that could only be changed by this Court. Pet. App. 7a-16a. This holding directly conflicts with *Williams*, as well as with Judge Sweet's recent ruling in *New York Times v. Gonzales*, both of which construed *Branzburg* differently and recognized a First Amendment privilege in the context of a grand jury proceeding. It also conflicts with decisions from federal courts recognizing a privilege in criminal trials and state courts of last resort that have specifically recognized a First Amendment reporter's privilege in grand jury proceedings. *See, e.g.*, *In re Letellier*, 578 A.2d 722, 726 (Me. 1990) ("The First Amendment thus requires that we balance the competing societal and constitutional interests on a case-by-case basis, weighing any possible injury to the free flow of informa-

tion against the recognized obligation of all citizens to give relevant evidence regarding criminal conduct.").[6]

This Court's review is needed to resolve the deep divisions among the federal and state courts regarding the meaning of *Branzburg* and whether a First Amendment reporter's privilege exists in criminal cases, including grand jury matters, as well as civil cases.

The Third and Eleventh Circuits hold, in conflict with the panel's decision here, that reporters have a First Amendment privilege in both civil *and* criminal cases. *See Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986).

In contrast, at least three circuits—the Fourth, Fifth, and Ninth—hold that a First Amendment privilege exists in civil cases, but not in criminal cases. *See LaRouche v. National Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1986) and *In re Shain*, 978 F.2d 850, 853 (4th Cir. 1992); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980) and *United States v. Smith*, 135 F.3d 963, 969 (5th Cir. 1998); *Schoen v. Schoen*, 5 F.3d 1289, 1296 (9th Cir. 1993) and *In re Grand Jury Proceedings*, 5 F.3d 397, 401-02 (9th Cir. 1993).

Two circuits—the Eighth and Tenth—have recognized a First Amendment privilege in civil cases, but have not directly addressed it in the criminal context. *See Cervantes v. Time Inc.*, 464 F.2d 986, 992 n.9 (8th Cir. 1972); *Silkwood v.*

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[6] *See also New Hampshire v. Siel*, 444 A.2d 499, 502 (N.H. 1982) ("Our review of *Branzburg* . . . convinces us that a majority of the justices on the United States Supreme Court recognized that a reporter had a qualified first amendment privilege to protect confidential sources."); *In re Pennington*, 581 P.2d 812, 815 (Kan. 1978) ("Courts applying *Branzburg* to criminal cases have generally concluded that the proper test for determining the existence of a reporter's privilege in a particular criminal case depends upon a balancing of the need of a defendant for a fair trial against the reporter's need for confidentiality.").

Kerr-McGee Corp., 563 F.2d 433, 437 (10th Cir. 1977). The Second Circuit recognizes a privilege, but has not specified whether it is rooted in the common law or the First Amendment (or both). *See Gonzales v. National Broad. Co.*, 194 F.3d 29, 36 & n.6 (2d Cir. 1999).

The Sixth and Seventh Circuits have taken an entirely different position, and hold that there is no First Amendment privilege in either civil *or* criminal cases. *See In re Grand Jury Proceedings*, 810 F.2d 580, 584 (6th Cir. 1987); *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003).

The need for this Court's review is demonstrated by the fact that many courts recognize a First Amendment-based reporter's privilege in one context but not in others. For example, the D.C. Circuit, while rejecting a First Amendment privilege in the grand jury context, nonetheless recognizes it in civil cases. *See Zerilli*, 656 F.2d at 711. As discussed above, federal law does not alter privileges based on the nature of the proceeding and specifically contemplates application of privileges in the grand jury context. *See* FED. R. EVID. 1101(c), (d)(2).

Thus, while the nature of the proceeding may have relevance to whether the privilege can be *defeated*, it has no relevance to whether the privilege *exists*. *See, e.g.*, *Gonzales*, 194 F.3d at 34 n.3 (there is "no legally-principled reason" for recognizing the privilege in one context but not another, but noting that the threshold to overcome the privilege may be "lower" in criminal cases). The public interest "in protecting confidential sources . . . does not change because a case is civil or criminal." *Cuthbertson*, 630 F.2d at 147.

2. This Court's Recent First Amendment Decisions Call *Branzburg* Into Question And Support Recognition Of A Privilege.

In rejecting a First Amendment privilege, the D.C. Circuit misread *Branzburg* and discounted the significance of Justice Powell's concurrence, which "narrow[s] what the majority opinion holds, by explaining the more limited interpre-

tation adopted by a necessary member of that majority." *McKoy v. North Carolina*, 494 U.S. 433, 462 n.3 (1990) (Scalia, J., joined by Rehnquist, C.J. and O'Connor, J., dissenting). Justice Powell's opinion makes clear that *Branzburg* did *not* preclude the assertion of a "claim to privilege" based on a reporter's "constitutional rights with respect to the gathering of news or in safeguarding their sources." 408 U.S. at 709-10 (Powell, J., concurring). *See* 1 John W. Strong, *McCormick on Evidence* § 76.2, at 288 (5th ed. 1999) (in *Branzburg*, the rejection of the First Amendment privilege "did not command an absolute majority of the Court").

But even if the D.C. Circuit's reading of *Branzburg* is correct, this Court has since rendered a series of First Amendment decisions that demonstrate that the law has developed in a way that strongly supports recognition of some form of privilege today. In cases where generally-applicable laws are applied to intrude on legitimate First Amendment interests, this Court has applied a heightened level of scrutiny and struck down government action that unjustifiably encroaches on those interests. *See, e.g.*, *Turner Broadcasting System v. FCC*, 512 U.S. 622, 642 (1994) (reviewing cable television must-carry law); *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (reviewing a radio station's distribution of information obtained from third parties who had unlawfully recorded cell phone calls). The rigorous level of scrutiny applied in these more recent cases stands in stark contrast to what the D.C. Circuit believed was *Branzburg*'s rejection of any First Amendment protection for confidential sources, with the result that the needs of law enforcement *always* trump the First Amendment interests at stake.

This Court has emphasized that where, as here, jurisprudential foundations have shifted, the power to bring the Court's earlier precedent in line with new authorities is reserved to this Court alone. Thus, even if the D.C. Circuit's reading of *Branzburg* were correct, the change in First Amendment law since that time makes this case uniquely appropriate for this Court's review. *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (overruling case that rested on "in-

creasingly wobbly, moth-eaten foundations") (quotation omitted); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989) (overruling precedent that had "fallen far out of step" with recent decisions).

C. The Existence Of A Reporter's Privilege Is A Recurring Issue Of Substantial Public Importance.

The questions presented by this petition are substantial and important. This Court has repeatedly recognized the important role of the press in obtaining and communicating information to the public in light of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The press, acting on behalf of the public, "serves and was designed to serve as a powerful antidote to any abuses of power by government officials as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

As shown above, *supra* p.18, the compelled disclosure of reporters' confidential sources endangers their ability to perform their constitutionally-recognized duties, and would stem the flow of information on public events that is vital to an informed citizenry and a healthy democracy. In this case, Cooper's story *A War on Wilson?* focused on the question whether government officials improperly retaliated against a critic of the Administration's decision to go to war. Yet Cooper now faces prison because the court of appeals concluded that a privilege it refused to define was overcome by evidence it refused to let him see.[7]

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[7] The panel's conclusion that any privilege would have been "overcome" by the Special Counsel's secret evidence, Pet. App. 16a, is deeply flawed. First, it makes no sense to deem the privilege "overcome" without having *defined* the privilege. Second, as discussed in Part II *infra*, it violates due process to deem the privilege "overcome" based on secret, *ex*

These issues are recurring with increased frequency. In the last two years, dozens of reporters have been subpoenaed to reveal their confidential sources, many of whom face the prospect of imminent imprisonment. *See* R. Smolkin, *Under Fire*, 27 Am. Journalism Review 18 (2005).

Given the unsettled state of the law in this area, reporters and their sources are subject to a patchwork of differing privilege rules depending on the jurisdiction in which they are subpoenaed. These differing rules can lead to arbitrary and conflicting outcomes, as illustrated by the experience of Judith Miller in the District of Columbia, where she was held in contempt for refusing to divulge her sources in this case, and in New York, where the district court held that the First Amendment and common law protected her from such compelled disclosure in another grand jury investigation being conducted by Mr. Fitzgerald. *See Gonzales*, 2005 WL 427911.[8] This uncertainty also has a chilling effect on speech, and ultimately results in less information reaching the public, as many individuals will hesitate in communicating with a reporter if a promise of confidentiality is respected in some jurisdictions but not others. In the end, differing standards defeat the very purpose of the privilege, as a state-law privilege is of little value if it offers no reliable protection from forced disclosure in federal court.

[Footnote continued from previous page]

parte evidence that neither petitioners nor their counsel were permitted to review.

[8] The identity of a source in the District of Columbia, for example, would be protected by the District's shield law in cases brought in the District of Columbia's courts, but not in federal courts. The shield law, D.C. Code § 16-4703(b), provides that "[a] court may not compel disclosure" of a reporter's sources. Notably, Congress could have "vetoed" the shield law via joint resolution, *see* D.C. Code Ann. § 1-233, but did not exercise its prerogative to do so.

II. REVIEW IS WARRANTED TO RESOLVE WHETHER DUE PROCESS PROHIBITS IMPRISONING OR FINING WITNESSES BASED ON SECRET EVIDENCE.

This Court should also grant review to determine whether the Due Process Clause forbids a court from imprisoning or fining witnesses for contempt based on secret *ex parte* evidence. The court of appeals' decision is incorrect and inconsistent with decisions of this and other courts.

The decision below conflicts with decisions of this Court holding that defendants must be given the opportunity to review and challenge the government's evidence against them before they may be imprisoned. In *In re Oliver*, 333 U.S. 257, 273-75 (1948), this Court reversed a contempt conviction where the district court had denied the defendant the "right to examine the witnesses against him," on the theory that the interest in maintaining grand jury secrecy justified the truncation of the alleged contemnor's right to present a defense. Although "[m]any reasons have been advanced to support grand jury secrecy . . . those reasons have never been thought to justify secrecy in the trial of an accused charged with violation of law for which he may be fined or sent to jail." *Id.* at 264. *See also Greene v. McElroy*, 360 U.S. 474, 496 (1959) ("where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue").

This Court again recognized the primacy of due process in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), in which it evaluated the procedural rights of an alleged enemy combatant in a case where substantial national security interests were at issue. The plurality held that the individual was entitled to "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker," and emphasized that "[a]ny process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct

without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short." *Id.* at 2648, 2651. *Hamdi* makes clear that when freedom is at stake, due process is not satisfied simply by compelling the government to meet a burden of production—indeed, this Court specifically rejected the government's proffered "some evidence" standard—but rather requires that an accused have the opportunity to challenge and rebut the government's evidence. Cooper and Time enjoyed no such opportunity here.

The D.C. Circuit's decision also conflicts with the Second Circuit's decision in *In re Kitchen*, 706 F.2d 1266 (2d Cir. 1983) and the Ninth Circuit's decision in *United States v. Alter*, 482 F.2d 1016 (9th Cir. 1973).

In *Kitchen*, the Second Circuit reversed a contempt order that was based on evidence the contemnor was not shown, just as in this case. *Kitchen* involved a grand jury witness who claimed he could not remember key events, and the government—believing his testimony was false and evasive—sought to hold him in contempt. The district court issued a contempt order, relying in part on transcripts from another witness's grand jury testimony—even though the government had disclosed only portions of that transcript to the alleged contemnor. The Second Circuit held that this use of secret evidence denied the witness his "basic right to a fair hearing before he is imprisoned." 706 F.2d at 1272. The court explained that due process includes "the right to confront the government's evidence," a right which "ordinarily includes the right to examine all documents considered by the court in reaching a decision." *Id.* at 1272-73.

In *Alter*, the Ninth Circuit reversed a contempt order involving a witness who refused to answer questions before a grand jury. The witness claimed that the questions were based on the government's illegal surveillance of him and his attorney. The government denied the charge, and the district court held the witness in contempt without convening an evidentiary hearing. The Ninth Circuit held that the contemnor's due process rights were violated because he was denied

the opportunity to demonstrate just cause for his refusal to testify and thereby "deprived of a meaningful opportunity to present his defense." 482 F.2d at 1024.[9]

Nor does grand jury secrecy justify a departure from these basic due process principles, especially since such secrecy is far from absolute. *See In re Motions of Dow Jones & Co.*, 142 F.3d 496, 498 (D.C. Cir. 1998) (grand jury witnesses may disclose the fact and substance of their testimony). In fact, this Court has "recognized that the invocation of grand jury interests is not 'some talisman that dissolves all constitutional protections.'" *Butterworth v. Smith*, 494 U.S. 624, 630 (1990). Even in cases involving classified information that directly implicates national security—such as enemy combatant cases—the government has made this information available to defendants or their security-cleared counsel. *See United States v. Moussaoui*, 382 F.3d 453, 475 (4th Cir. 2004) (defendant has due process right to review all evidence in government's possession that is material to his defense); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 468 (D.D.C. 2005) (military tribunals violated due process because "[n]o detainee . . . was ever permitted access to any classified information").

In this case, any government interest in secrecy arising from the nature of grand jury proceedings or the use of classified information could have been vindicated through protective orders limiting review to petitioners or their counsel. Such protective orders are routinely issued under the Classified Information Procedures Act, 18 U.S.C. App. III § 3, and could easily be employed in this case to protect petitioners' due process rights.

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[9] Judge Tatel, in his statement concurring in the denial of rehearing en banc, noted that *Kitchen* and *Alter* did not "involve compulsion of testimony due to failure of an asserted privilege." Pet. App. 120a-121a. This factual distinction makes no constitutional difference. The relevant question is whether alleged contemnors may review and challenge the evidence used against them, and in that regard the D.C. Circuit's decision is inconsistent with decisions from this and other courts.

CONCLUSION

The time has come for this Court to dispel the conflict and confusion that have plagued the lower courts for more than thirty years. This case squarely presents important questions of law that have divided the circuits and left reporters and their sources in a state of uncertainty, jeopardizing the free flow of information to the public. This Court should grant review and recognize a federal reporter's privilege.

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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May 10, 2005

APPENDIX

APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 8, 2004 Decided February 15, 2005
Reissued April 4, 2005

No. 04-3138

IN RE: GRAND JURY SUBPOENA, JUDITH MILLER

Consolidated with
04-3139, 04-3140

Appeals from the United States District Court
for the District of Columbia
(No. 04mc00407)
(No. 04mc00460)
(No. 04mc00461)

Floyd Abrams argued the cause for appellants. With him on the briefs was *Joel Kurtzberg*. *Donald J. Mulvihill* entered an appearance.

Reid Alan Cox was on the brief for *amicus curiae* Center for Individual Freedom in support of appellants.

Theodore J. Boutrous, Jr. and *Thomas H. Dupree, Jr.* were on the brief for *amici curiae* Magazine Publishers of America, Inc., et al. in support of appellants.

James P. Fleissner, Assistant U.S. Attorney, argued the cause and filed the brief for appellee.

Before: SENTELLE, HENDERSON and TATEL, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SENTELLE.

Concurring opinion filed by *Circuit Judge* SENTELLE.

Concurring opinion filed by *Circuit Judge* HENDERSON.

Opinion concurring in the judgment filed by *Circuit Judge* TATEL.

SENTELLE, *Circuit Judge*: An investigative reporter for the New York Times; the White House correspondent for the weekly news magazine Time; and Time, Inc., the publisher of Time, appeal from orders of the District Court for the District of Columbia finding all three appellants in civil contempt for refusing to give evidence in response to grand jury subpoenas served by Special Counsel Patrick J. Fitzgerald. Appellants assert that the information concealed by them, specifically the identity of confidential sources, is protected by a reporter's privilege arising from the First Amendment, or failing that, by federal common law privilege. The District Court held that neither the First Amendment nor the federal common law provides protection for journalists' confidential sources in the context of a grand jury investigation. For the reasons set forth below, we agree with the District Court that there is no First Amendment privilege protecting the evidence sought. We further conclude that if any such common law privilege exists, it is not absolute, and in this case has been overcome by the filings of the Special Counsel with the District Court. We further conclude that other assignments of error raised by appellants are without merit. We therefore affirm the decision of the District Court.

I. Background

According to the briefs and record before us, the controversy giving rise to this litigation began with a political and news media controversy over a sixteen-word sentence in the State of the Union Address of President George W. Bush on January 28, 2003. In that address, President Bush stated: "The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa." The ensuing public controversy focused not on the British source of the alleged information, but rather on the accuracy of the proposition that Saddam Hussein had sought uranium, a key ingredient in the development of nuclear weaponry, from Africa. Many publications on the subject followed. On July 6, 2003, the New York Times published an op-ed piece by former Ambassador Joseph Wilson, in which he claimed to have been sent to Niger in 2002 by the Central Intelligence Agency ("CIA") in response to inquiries from Vice President Cheney to investigate whether Iraq had been seeking to purchase uranium from Niger. Wilson claimed that he had conducted the requested investigation and reported on his return that there was no credible evidence that any such effort had been made.

On July 14, 2003, columnist Robert Novak published a column in the Chicago Sun-Times in which he asserted that the decision to send Wilson to Niger had been made "routinely without Director George Tenet's knowledge," and, most significant to the present litigation, that "two senior administration officials" told him that Wilson's selection was at the suggestion of Wilson's wife, Valerie Plame, whom Novak described as a CIA "operative on weapons of mass destruction." Robert Novak, *The Mission to Niger*, CHI. SUN-TIMES, July 14, 2003, *at* 31. After Novak's column was published, various media accounts reported that other reporters had been told by government officials that Wilson's wife worked at the CIA monitoring weapons of mass

destruction, and that she was involved in her husband's selection for the mission to Niger. One such article, published by Time.com on July 17, 2003, was authored in part by appellant Matthew Cooper. That article stated that:

> Some government officials have noted to Time in interviews . . . that Wilson's wife, Valerie Plame, is a CIA official who monitors the proliferation of weapons of mass destruction . . . [and] have suggested that she was involved in the husband's being dispatched to Niger to investigate reports that Saddam Hussein's government had sought to purchase large quantities of uranium ore . . . .

Matthew Cooper et al., *A War on Wilson?*, TIME.COM, *at* http://www.time.com/time/nation/article/0,8599,465270,00.html (Dec. 13, 2004). Other media accounts reported that "two top White House officials called at least six Washington journalists and disclosed the identity and occupation of Wilson's wife." Mike Allen & Dana Priest, *Bush Administration is Focus of Inquiry; CIA Agent's Identity was Leaked to Media*, WASH. POST, Sept. 28, 2003, at A1. The Department of Justice undertook an investigation into whether government employees had violated federal law by the unauthorized disclosure of the identity of a CIA agent. *See, e.g.*, 50 U.S.C. § 421 (criminalizing, *inter alia*, disclosure of the identity of a covert agent by anyone having had authorized access to classified information). As the investigation proceeded, in December of 2003, the Attorney General recused himself from participation and delegated his full authority in the investigation to the Deputy Attorney General as Acting Attorney General. The Deputy, in turn, appointed Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, as Special Counsel and delegated full authority concerning the investigation to him.

As part of the ongoing investigation, a grand jury investigation began in January of 2004.

In cooperation with Special Counsel Fitzgerald, the grand jury conducted an extensive investigation. On May 21, 2004, a grand jury subpoena was issued to appellant Matthew Cooper, seeking testimony and documents related to two specific articles dated July 17, 2003, and July 21, 2003, to which Cooper had contributed. Cooper refused to comply with the subpoena, even after the Special Counsel offered to narrow its scope to cover only conversations between Cooper and a specific individual identified by the Special Counsel. Instead, Cooper moved to quash the subpoena on June 3, 2004. On July 6, 2004, the Chief Judge of the United States District Court for the District of Columbia denied Cooper's motion in open court, and confirmed the denial with reasoning set forth in a written order issued on July 20, 2004.

A further grand jury subpoena was issued to Time, Inc., seeking the same documents requested in the subpoena to Cooper. Time also moved to quash its subpoena. On August 6, 2004, the District Court denied Time's motion. Both Cooper and Time refused to comply with the subpoenas despite the District Court's denial of their motions to quash. The District Court thereafter found that Cooper and Time had refused to comply with the subpoenas without just cause and held them in civil contempt of court. After both Cooper and Time had filed appeals, and further negotiations between Special Counsel and the two had proceeded, Cooper agreed to provide testimony and documents relevant to a specific source who had stated that he had no objection to their release. Cooper and Time fulfilled their obligations under the agreement, the Special Counsel moved to vacate the District Court's contempt order, and the notices of appeal were voluntarily dismissed.

On September 13, 2004, the grand jury issued a further subpoena to Cooper seeking "[a]ny and all documents . . .

[relating to] conversations between Matthew Cooper and official source(s) prior to July 14, 2003, concerning in any way: former Ambassador Joseph Wilson; the 2002 trip by former Ambassador Wilson to Niger; Valerie Wilson Plame, a/k/a Valerie Wilson, a/k/a Valerie Plame (the wife of former Ambassador Wilson); and/or any affiliation between Valerie Wilson Plame and the CIA." An August 2, 2004 subpoena to Time requested "[a]ll notes, tape recordings, e-mails, or other documents of Matthew Cooper relating to the July 17, 2003 Time.com article entitled 'A War on Wilson?' and the July 21, 2003 Time Magazine article entitled, 'A Question of Trust.'" Cooper and Time again moved to quash the subpoenas, and on October 7, 2004, the District Court denied the motion. The two refused to comply with the subpoenas, and on October 13, 2004, the District Court held that their refusal was without just cause and held both in contempt.

In the meantime, on August 12 and August 14, grand jury subpoenas were issued to Judith Miller, seeking documents and testimony related to conversations between her and a specified government official "occurring from on or about July 6, 2003, to on or about July 13, 2003, . . . concerning Valerie Plame Wilson (whether referred to by name or by description as the wife of Ambassador Wilson) or concerning Iraqi efforts to obtain uranium." Miller refused to comply with the subpoenas and moved to quash them. The District Court denied Miller's motion to quash. Thereafter, the court found that Miller had refused to comply without just cause and held her in civil contempt of court also. She also has appealed.

The appellants have proceeded with common counsel and common briefing in a consolidated proceeding before this court. They assert four theories for reversal. Their first claim is that the First Amendment affords journalists a constitutional right to conceal their confidential sources even against the subpoenas of grand juries. Secondly, they claim

that reporters enjoy an evidentiary privilege under the common law to conceal confidential sources. Adjunct to this claim, while denying that the privilege is less than absolute, they argue that if the privilege is in fact qualified, the United States has not overcome the privilege. Thirdly, appellants argue that their due process rights were violated by the Special Counsel's ex parte and in camera submission of evidence to the court to establish that the United States had overcome any qualified privilege. Finally, they argue that the Special Counsel failed to comply with Department of Justice guidelines for the issuance of subpoenas to journalists, and that the failure to comply is an independent ground for reversal of their contempt conviction. Finding no grounds for relief under the First Amendment, due process clause, or Department of Justice guidelines, and persuaded that any common law privilege that exists would be overcome in this case, we affirm the judgment of the District Court for the reasons set out more fully below.

II. Analysis

A. *The First Amendment Claim*

In his opinion below, the Chief District Judge held that "a reporter called to testify before a grand jury regarding confidential information enjoys no First Amendment protection." *In Re Special Counsel Investigation*, 332 F. Supp. 2d 26, 31 (D.D.C. 2004). Appellants argue that "this proposition of law is flatly contrary to the great weight of authority in this and other circuits." Appellants are wrong. The governing authority in this case, as the District Court correctly held, comes not from this or any other circuit, but the Supreme Court of the United States. In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Highest Court considered and rejected the same claim of First Amendment privilege on facts materially indistinguishable from those at bar.

Like the present case, *Branzburg* was a consolidated proceeding involving multiple contempt proceedings against

news media defendants. The named petitioner, Branzburg, had been held in contempt in two related proceedings, arising from one extended task of investigative journalism. The first arose from an article published by his employer, a daily newspaper, describing his observation of two Kentucky residents synthesizing hashish from marijuana as part of a profitable illegal drug operation. The article included a photograph "of hands working above a laboratory table on . . . a substance identified . . . as hashish." 408 U.S. at 667. A Kentucky grand jury subpoenaed the journalist who "refused to identify the individuals he had seen possessing marihuana or the persons he had seen making hashish from marihuana." *Id.* at 668. Branzburg claimed privilege both under the First Amendment of the United States Constitution and various state statutory and constitutional provisions. He was held in contempt and the proceeding eventually made its way to the Supreme Court.

The second case involving petitioner Branzburg arose out of a later article published by the same newspaper describing the use of drugs in Frankfort, Kentucky. According to the article, this publication was the product of two weeks spent interviewing drug users in the area. The article further reported that its author had seen some of his sources smoking marijuana. The article related numerous conversations with and observations of unnamed drug users. Branzburg was again subpoenaed to appear before a Kentucky grand jury "to testify in the matter of violation of statutes concerning use and sale of drugs," *id.* at 669 (internal quotation marks omitted). Branzburg moved to quash the subpoena. The motion was denied. The journalist sought the protection of the Kentucky Court of Appeals by way of mandamus and prohibition, claiming "that if he were forced to go before the grand jury or to answer questions regarding the identity of informants or disclose information given him in confidence, his effectiveness as a reporter would be greatly damaged." *Id.* at 670. The Kentucky courts rejected

Branzburg's claim of a First Amendment privilege. Again, he petitioned for certiorari in the Supreme Court.

The consolidated petitions in *Branzburg* also included *In re Pappas*. Petitioner Pappas was a television newsman-photographer for a Massachusetts television station. On July 30, 1970, during a time of civil unrest in New Bedford, Massachusetts, he gained entrance to the headquarters of the Black Panther Party, upon his agreement not to disclose anything he saw or heard inside the headquarters. Subsequently, he was subpoenaed to appear before a Massachusetts grand jury. Although he appeared and answered other questions, he refused to answer any questions about what had taken place inside the Black Panther headquarters, "claiming that the First Amendment afforded him a privilege to protect confidential informants and their information." *Id.* at 673. The Massachusetts trial court denied his motion to quash made on First Amendment and other grounds and ruled that the journalist "had no constitutional privilege to refuse to divulge to the grand jury what he had seen and heard, including the identity of persons he had observed." *Id.* Like Branzburg, Pappas petitioned for certiorari to the United States Supreme Court.

In the final petition consolidated in the *Branzburg* proceedings, the Court considered the petition for certiorari of the United States from a decision of the Ninth Circuit Court of Appeals, *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), in which the circuit had recognized a qualified testimonial privilege for newsmen arising from the First Amendment and allowing a reporter claiming protection under the privilege to refuse to testify before a grand jury investigating allegations of violations of numerous criminal statutes by the Black Panther Party in California. The reporter in *Caldwell* had engaged in investigative journalism directed toward the Black Panthers at a time when they were suspected of such crimes as making threats against the

President of the United States and a possible conspiracy to assassinate the President, as well as interstate travel to incite rioting and the commission of mail frauds and swindles. He claimed to have obtained information from confidential informants.

As can be seen from the account of the underlying facts in *Branzburg*, there is no material factual distinction between the petitions before the Supreme Court in *Branzburg* and the appeals before us today. Each of the reporters in *Branzburg* claimed to have received communications from sources in confidence, just as the journalists before us claimed to have done. At least one of the petitioners in *Branzburg* had witnessed the commission of crimes. On the record before us, there is at least sufficient allegation to warrant grand jury inquiry that one or both journalists received information concerning the identity of a covert operative of the United States from government employees acting in violation of the law by making the disclosure. Each petitioner in *Branzburg* and each journalist before us claimed or claims the protection of a First Amendment reporter's privilege. The Supreme Court in no uncertain terms rejected the existence of such a privilege. As we said at the outset of this discussion, the Supreme Court has already decided the First Amendment issue before us today.

In rejecting the claim of privilege, the Supreme Court made its reasoning transparent and forceful. The High Court recognized that "the grand jury's authority to subpoena witnesses is not only historic . . . but essential to its task." 408 U.S. at 688 (citation omitted). The grand juries and the courts operate under the "longstanding principle that 'the public has a right to every man's evidence,' except for those persons protected by constitutional, common law, or statutory privilege." *Id.* (citations and internal punctuation omitted). The Court then noted that "the only testimonial privilege for unofficial witnesses that is rooted in the Federal

Constitution is the Fifth Amendment privilege against compelled self-incrimination." *Id.* at 689-90. The Court then expressly declined "to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy." *Id.* at 690. In language as relevant to the alleged illegal disclosure of the identity of covert agents as it was to the alleged illegal processing of hashish, the Court stated that it could not "seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about a crime than to do something about it." *Id.* at 692.

Lest there be any mistake as to the breadth of the rejection of the claimed First Amendment privilege, the High Court went on to recognize that "there remain those situations where a source is not engaged in criminal conduct but has information suggesting illegal conduct by others." *Id.* at 693. As to this category of informants, the Court was equally adamant in rejecting the claim of First Amendment privilege:

> [W]e cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.

Id. at 695.

The *Branzburg* Court further supported the rejection of this claimed privilege by the commonsense observation that "it is obvious that agreements to conceal information relevant to the commission of crime have very little to recommend them from the standpoint of public policy." *Id.* at 696. While the Court recognized the right of the press to abide by

its agreements not to publish information that it has, the Court stated unequivocally that "the right to withhold news is not equivalent to a First Amendment exemption from an ordinary duty of all other citizens to furnish relevant information to a grand jury performing an important public function." *Id.* at 697.

We have pressed appellants for some distinction between the facts before the Supreme Court in *Branzburg* and those before us today. They have offered none, nor have we independently found any. Unquestionably, the Supreme Court decided in *Branzburg* that there is no First Amendment privilege protecting journalists from appearing before a grand jury or from testifying before a grand jury or otherwise providing evidence to a grand jury regardless of any confidence promised by the reporter to any source. The Highest Court has spoken and never revisited the question. Without doubt, that is the end of the matter.

Despite the absolute and unreversed answer to the question of constitutional privilege by the Supreme Court in *Branzburg*, appellants nonetheless persist in arguing that the District Court erred in concluding that journalists subpoenaed to reveal their confidential sources before federal grand juries enjoy no First Amendment protection. They base this argument on the concurring opinion of Justice Powell in *Branzburg* and a case from this circuit, *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981). These authorities, either separately or together, provide no support for the existence of such a privilege protecting reporters subpoenaed to a grand jury. Appellants' argument concerning Justice Powell's concurrence begins with the fact that the decision of the Supreme Court was reached by a 5-4 divided Court. Thus, each of the justices joining in the result was essential to the result. Therefore, appellants argue, it is the opinion of the least encompassing justice which determines the precedent set by the decision rather than the decision which appellants

style a "plurality" opinion authored by Justice White. In support of this proposition, they advance an argument that first admits that when the opinion of an individual justice is not needed for a majority his separate opinion is not a gloss giving authoritative definition to the majority opinion in which he did not join, but rather is no more than his separate thoughts, and "the meaning of a majority opinion is to be found within the opinion itself." *McKoy v. North Carolina*, 494 U.S. 433, 448 n.3 (1990) (Blackmun, J., concurring). But, appellants argue, when the individual justice is needed to constitute the majority, "the opinion is not a majority except to the extent that it agrees with his views. What he writes is not a 'gloss' but the least common denominator." That is to say, the separate opinion "cannot add to what the majority opinion holds, binding the other four justices to say what they have not said; but it can assuredly narrow what the majority opinion holds, by explaining the more limited interpretation adopted by a necessary member of that majority . . . ." *Id.* at 462 n.3 (Scalia, J., joined by Rehnquist, C.J., and O'Connor, J., dissenting).

Without attempting to resolve any dispute or difference that may exist between Justice Blackmun and the three dissenting justices in *McKoy*, even if we accept Justice Scalia's analysis at full value, it does not help appellants in this case. Justice Powell's concurring opinion was not the opinion of a justice who refused to join the majority. He joined the majority by its terms, rejecting none of Justice White's reasoning on behalf of the majority. He wrote separately "to emphasize" what seemed to him "to be the limited nature of the Court's holding." 408 U.S. at 709 (Powell, J., concurring). Justice White's opinion is not a plurality opinion of four justices joined by a separate Justice Powell to create a majority, it is the opinion of the majority of the Court. As such it is authoritative precedent. It says what it says. It rejects the privilege asserted by appellants.

Nonetheless, appellants urge that Justice Powell must have been contemplating the creation or recognition of some further sort of First Amendment privilege for reporters asserting confidential sources, else why would he have bothered writing? To that, the United States replies that by its terms Justice Powell's opinion recognizes only that

> if the newsman is called upon to give information bearing only on a remote and tenuous relationship to the subject investigation, of if he has some other reason to believe that his testimony implicates confidential source relationships *without a legitimate need of law enforcement*, he will have access to the court on a motion to quash and an appropriate protective order may be entered.

Id. at 710 (emphasis added).

Therefore, the United States contends, Justice Powell, who expressed no disagreement with the majority about the existence of a constitutional privilege, only emphasized that there would be First Amendment protection in cases of bad faith investigations. Appellants counter that Justice Powell could not have meant what the United States argues, as this would have given reporters no more protection than other citizens. However, they never make it clear why they are convinced that Justice Powell must have intended to give reporters more protection than other citizens. The Constitution protects all citizens, and there is no reason to believe that Justice Powell intended to elevate the journalistic class above the rest. *Cf. Branzburg* at 690 ("the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination.").

In any event, whatever Justice Powell specifically intended, he joined the majority. Not only did he join the

majority in name, but because of his joinder with the rest of a majority, the Court reached a result that rejected First Amendment privilege not to testify before the grand jury for reporters situated precisely like those in the present case. As we noted above, there is no factual difference between *Branzburg* and the present case. If Justice Powell in any way meant to afford more protection than was afforded by the rest of the majority, that protection cannot possibly extend to appellants as *Branzburg* is directly on point and reached a result in which Justice Powell joined, rejecting the applicability of constitutional privilege.

Zerilli cannot possibly help appellants, although they assert that *Zerilli*, citing Justice Powell's "deciding vote" in *Branzburg*, recognized, at least in dicta, a reporter's privilege in civil cases and held that *Branzburg* was not controlling as to that issue. Indeed, the *Zerilli* Court expressly distinguished its case from *Branzburg*. "Although *Branzburg* may limit the scope of a reporter's First Amendment privilege in criminal proceedings, this circuit has previously held that in civil cases, where the public interest in effective law enforcement is absent, that case is not controlling." 656 F.2d at 705. *Zerilli* has no force in the present case. Even if *Zerilli* states the law applicable to civil cases, this is not a civil case. *Zerilli* could not subtract from the Supreme Court's holding in *Branzburg*. *Zerilli*, along with several other lower court decisions cited by appellants, may recognize or at least suggest the possibility of privileges under various circumstances. None of them can change the law applicable to grand juries as set forth in *Branzburg*. As the Supreme Court has told us:

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the court of appeals should follow the case which directly controls, leaving to

> this Court the prerogative of overruling its own decisions.

Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 484 (1989). The Supreme Court has not overruled *Branzburg*.

B. *The Common Law Privilege*

Appellants argue that even if there is no First Amendment privilege protecting their confidential source information, we should recognize a privilege under federal common law, arguing that regardless of whether a federal common law privilege protecting reporters existed in 1972 when *Branzburg* was decided, in the intervening years much has changed. While appellants argue for an absolute privilege under the common law, they wisely recognize the possibility that a court not recognizing such an absolute privilege might nonetheless find a qualified privilege. They therefore also argue that if there is a qualified privilege, then the government has not overcome that qualified privilege. The Court is not of one mind on the existence of a common law privilege. Judge Sentelle would hold that there is no such common law privilege for reasons set forth in a separate opinion. Judge Tatel would hold that there is such a common law privilege. Judge Henderson believes that we need not, and therefore should not, reach that question. However, all believe that if there is any such privilege, it is not absolute and may be overcome by an appropriate showing. All further believe, for the reasons set forth in the separate opinion of Judge Tatel, that if such a privilege applies here, it has been overcome. Therefore, the common law privilege, even if one exists, does not warrant reversal.

C. *The Due Process Argument*

While appellants insist that their privilege is absolute, they assert a secondary line of argument that if their privilege is conditional, then their due process rights have been

violated by the refusal of the Special Counsel and the District Court to provide them access to the Special Counsel's secret evidentiary submissions in support of the enforcement of the subpoenas. This argument is without merit. As appellants themselves admit in their brief, this circuit has recognized that "a district court can ensure that [grand jury] secrecy is protected by provisions for sealed, or when necessary *ex parte*, filings." *In re Grand Jury*, 121 F.3d 729, 757 (D.C. Cir. 1997). Indeed, the rule of grand jury secrecy is so well established that we have noted that "[t]here is a plethora of authority recognizing that the grand jury context presents an unusual setting where privacy and secrecy are the norm." *In re Sealed Case*, 199 F.3d 522, 526 (D.C. Cir. 2000) (collecting authorities).

As the Supreme Court has reminded us on occasion, "the grand jury is an institution separate from the courts." *United States v. Williams*, 504 U.S. 36, 47 (1992). The function of that separate institution is to "serv[e] as a kind of buffer or referee between the government and the people." *Id.* The function of the grand jury "depends on 'maintaining the secrecy of the grand jury proceedings in the federal courts.'" *In re Sealed Case*, 199 F.3d at 526 (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958)). The authorities collected in *In re Sealed Case* recite the broad variety of circumstances in which the courts have upheld this grand jury secrecy, a secrecy that has been the persistent rule for grand jury proceedings for at least four hundred years. *See Douglas Oil v. Petrol Stops Northwest*, 441 U.S. 211, 218 n.9 (1979) ("Since the 17th century, grand jury proceedings have been closed to the public, and records of such proceedings have been kept from the public eye.").

In the *Douglas Oil* decision, the Supreme Court catalogs multiple reasons for preserving the ancient secrecy of the grand jury:

> (1) disclosure of pre-indictment proceedings would make many prospective witnesses "hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony"; (2) witnesses who did appear "would be less likely to testify fully and frankly as they would be open to retribution as well as inducements"; and (3) there "would be the risk that those about to be indicted would flee or would try to influence individual grand jurors to vote against indictment."

In re North (Omnibus Order), 16 F.3d 1234, 1242 (D.C. Cir., Spec. Div., 1994) (quoting *Douglas Oil Co.*, 441 U.S. at 218-19).

Appellants have offered nothing to take the present grand jury investigation outside the general rule, let alone elevate their objections to constitutional due process status. Indeed, appellants' argument is principally built around a case from another circuit never authoritative here, no longer authoritative in the circuit of its origin, and distinguishable on its facts from the beginning. In *United States v. Dinsio*, 468 F.2d 1392 (9th Cir. 1973), the court ruled that a defendant who had been held in contempt for refusing to furnish finger and palm print exemplars to a federal grand jury was deprived of her due process rights when the district court refused to let her inspect an ex parte government affidavit upon which the court had determined that the grand jury's request was reasonable. The Ninth Circuit itself has since declared that "to the extent that our decision in *United States v. Dinsio* . . . may be considered to support the witness in his refusal to cooperate, it has been superseded by *United States v. Mara* [410 U.S. 19 (1973)], and *United States v. Dionisio*, 410 U.S. 1 (1973)." *In re Braughton*, 520 F.2d 765, 767 (9th Cir. 1975). The Ninth Circuit went on to say

"nothing in the law of this circuit now requires a court to interrupt a grand jury while a recalcitrant witness produces a series of mini trials challenging the reasonableness of the government's efforts to obtain fingerprint, voice, or handwriting exemplars or the relevance of such exemplars to the government's case." *Id.*

Similarly, *Dinsio* was never the law of this circuit, just as it is no longer the law of the Ninth Circuit, and nothing in the law of the District of Columbia Circuit requires or has ever required a district court to interrupt the grand jury while a recalcitrant witness enjoys a series of mini trials over his access to materials cloaked by grand jury secrecy.

Assuming for the sake of this case that the general rule of grand jury secrecy is not sufficient to justify the District Court's use of *in camera* and *ex parte* proceedings, we further note that we have approved the use of such a procedure in other cases raising privilege claims. In *In re Sealed Case No. 98-377*, 151 F.3d 1059 (D.C. Cir. 1998), a case, like this one, involving the use of *in camera* and *ex parte* proceedings in the context of a Rule 6(e) motion by the government, we upheld their use, and in so doing, relied, at least in part, on precedent established in privilege analysis. We observed there that "courts often use *in camera*, *ex parte* proceedings to determine the propriety of a crime fraud exception to the attorney-client privilege when such proceedings are necessary to ensure the secrecy of ongoing grand jury proceedings." *Id.* at 1075 (citing *In re Grand Jury*, 103 F.3d 1140, 1145 (3d Cir.), *cert. denied sub nom. Roe v. United States*, 520 U.S. 1253 (1997)). Having previously noted the propriety of the procedures to protect the well-established attorney-client privilege, we are persuaded that a similar protection of grand jury secrecy is appropriate to protect whatever privilege, if any, may exist between a reporter and a confidential source.

We affirm the District Court's ruling on the maintenance of the seal of grand jury secrecy.

D. *Department of Justice Guidelines*

In their final argument for reversal of the District Court's contempt finding, appellants contend that the Special Counsel did not comply with the Department of Justice guidelines for issuing subpoenas to news media and that such failure provides an independent basis for reversal. The District Court expressed its doubt that the DOJ guidelines were enforceable, but found that even if they were, Special Counsel had fully complied with the guidelines. Because we conclude that the guidelines create no enforceable right, we need not reach the question of the Special Counsel's compliance.

The guidelines in question are set forth in 28 C.F.R. § 50.10 and the United States Attorney's Manual, § 9-2.161. Those guidelines provide that subpoenas for testimony by news media must be approved by the Attorney General, a requirement not pertinent in the present case as the Special Counsel had received delegation of all the Attorney General's authority, and should meet the following standards:

(a) "In criminal cases, there should be reasonable grounds to believe, based on information obtained from nonmedia sources, that a crime has occurred, and that the information sought is essential to a successful investigation—particularly with reference to establishing guilt or innocence. The subpoena should not be used to obtain peripheral, nonessential, or speculative information." 28 C.F.R. § 50.10(f)(1).

(b) Before issuing a subpoena to a member of the news media, all reasonable efforts should be made to obtain desired information from alternative sources. *Id.* at §§ 50.10(b), 50.10(f)(3);

(c) Wherever possible, subpoenas should be directed at information regarding a limited subject matter and a reasonably limited period of time. Subpoenas should avoid requiring production of a large volume of unpublished materials and provide reasonable notice of the demand for documents. *Id.* at § 50.10(f)(6);

(d) "The use of subpoenas to members of the news media should, except under exigent circumstances, be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of published information." *Id.* at § 50.10(f)(4); and

(e) When issuance of a subpoena to a member of the media is contemplated, the government shall pursue negotiations with the relevant media organization. The negotiations should seek accommodation of the interests of the grand jury and the media. Where the nature of the investigation permits, the government should make clear what its needs are in a particular case as well as its willingness to respond to particular problems of the media. *Id.* at § 50.10(c).

However, as the District Court correctly observed, the guidelines expressly state that they do "not create or recognize any legally enforceable right in any person." *Id.* at § 50.10(n). This reservation has been upheld by several federal appellate and district courts. *See In re Special Proceedings*, 373 F.3d 37, 44 n.3 (1st Cir. 2004) (noting that DOJ guidelines state that they do not create legally enforceable rights); *In re Grand Jury Subpoena American Broadcasting Companies, Inc.*, 947 F. Supp. 1314, 1322 (D. Ark. 1996) (declining to quash subpoena based on failure to comply with DOJ regulations, on ground that regulations, by their own terms, confer no rights on media witnesses). *See also In re Grand Jury Proceedings No. 92-4*, 42 F.3d 876, 880 (4th Cir. 1994) (holding that special prosecutor's

failure to comply with guidelines regarding issuance of subpoenas to attorney, even if applicable, were not enforceable by witness through motion to quash). The guidelines, not required by any constitutional or statutory provision, *see In re Special Proceedings*, 373 F.3d at 44 n.3, exist to guide the Department's exercise of its discretion in determining whether and when to seek the issuance of subpoenas to reporters, not to confer substantive or procedural benefits upon individual media personnel. *See In re Shain*, 978 F.2d 850, 853 (4th Cir. 1992) (holding reporters have no right to seek enforcement of DOJ guidelines before being compelled to testify) (citing *United States v. Caceres*, 440 U.S. 741 (1979) (exclusionary rule not applicable to evidence obtained in violation of internal IRS regulations governing electronic surveillance)); *In re Grand Jury Proceedings No. 92-4*, 42 F.3d at 880 (following *In re Shain*, 978 F.2d at 854).

Appellants rely on *Morton v. Ruiz*, 415 U.S. 199 (1974). In that case, the Supreme Court stated that "where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Id.* at 235.

Ruiz, however, is distinguishable. Regulations considered by the Court in that case required the publication of directives that "inform the public of privileges and benefits available and of eligibility requirements." *Id.* (quotation marks omitted). The Supreme Court found that the publication requirement was intended to benefit potential beneficiaries and therefore invalidated a Bureau of Indian Affairs attempt to limit general assistance benefits to otherwise eligible beneficiaries based on an unpublished eligibility requirement. This reasoning has no applicability to the guidelines before us.

It is well established that the exercise of prosecutorial discretion is at the very core of the executive function. Courts consistently hesitate to attempt a review of the executive's exercise of that function. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996). Federal prosecutors have "broad discretion to enforce the Nation's criminal laws." *Id.* at 464 (internal punctuation and citations omitted). The prosecutor's discretion arises from their designation "as the President's delegates to help him discharge his constitutional responsibility to 'take care that the laws be faithfully executed.'" *Id.* (quoting U.S. CONST. art. II, § 3). Given the nature of the guidelines themselves, and the function they govern, we conclude that the guidelines provide no enforceable rights to any individuals, but merely guide the discretion of the prosecutors. We therefore need not reach the question of the Special Counsel's compliance with the guidelines, and again we affirm the decision of the District Court.

III. Conclusion

For the reasons set forth above, the judgment of the District Court is affirmed.

SENTELLE, *Circuit Judge, concurring*: As noted in the opinion of the court, I write separately to express my differing basis for affirming the District Court on the common law privilege issue. I would hold that reporters refusing to testify before grand juries as to their "confidential sources" enjoy no common law privilege beyond the protection against harassing grand juries conducting groundless investigations that is available to all other citizens. While I understand, and do not actually disagree with, the conclusion of my colleagues that any such privilege enjoyed by the reporters has been overcome by showing of the United States, and that we therefore need not determine whether such privilege exists, I find this ordering of issues a bit disturbing. To me, the question of the existence of such privilege *vel non* is logically anterior to the quantum of proof necessary to overcome it. While I understand Judge Henderson's theory that she cannot support a privilege afforded by the common law which would not be overcome by the quantum of proof offered by the government, I think it more logical to not reach the quantum question in the absence of a determination as to the existence of the privilege than to proceed the other way around.[1] That said, I fully join the conclusion that we should affirm the District Court's decision to hold the appellants in contempt, unswayed by their claim of protection of common law privilege. I write separately only to explain my reasons for rejecting the theory that such a privilege is known to the common law.

I base my rejection of the common law privilege theory on foundations of precedent, policy, and separation of powers. As to precedent, I find *Branzburg v. Hayes*, 408 U.S. 665 (1972), to be as dispositive of the question of

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[1] See Opinion of Judge Tatel at pp. 5-9.

common law privilege as it is of a First Amendment privilege. While *Branzburg* generally is cited for its constitutional implications, the Branzburg Court repeatedly discussed the privilege question in common law terms as well as constitutional. Indeed, the majority opinion by Justice White includes the phrase "common law" no fewer than eight times. More significant than the fact that the Court frequently spoke of the common law is what the Court had to say about it: "at common law, courts consistently refuse to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury." *Id.* at 685 (collecting cases).

At page 688, the Court continued, "although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, *common law*, or statutory privilege . . . is particularly applicable to grand jury proceedings." (emphasis added) (citations omitted). Significantly, the Court made this statement in the course of holding the journalists litigating before it unprotected by privilege against contempt citations. Granted, the Court expressly held that it was not about to create a new "constitutional" privilege. But in the same paragraph with that rejection it expressly discusses the possible protection of common law and in the end reaches a result that leaves the reporters unprotected. I think it therefore indisputable that the High Court rejected a common law privilege in the same breath as its rejection of such a privilege based on the First Amendment. Especially is this so when we consider that it makes little sense to assume that the Court first reached out to take a constitutional question it would not have needed to answer had there been such a common law privilege, and

then proceeded to answer that question in such a fashion as to reach a result upholding contempt citations and reversing vacation of such citations.[2]

Because the Supreme Court rejected the common law privilege, I think it would be at least presumptuous if not overreaching for us to now adopt the privilege. As the opinion of the court notes, "the Supreme Court has told us:

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the court of appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Maj. Op. at 16 (quoting *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989)).

The Supreme Court has rejected a common law privilege for reporters subpoenaed to give evidence to grand juries. In my view that rejection stands unless and until the Supreme Court itself overrules that part of *Branzburg*. Although the appellants argue that other changes in the law since

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[2] By way of comparison, under the constitutional avoidance doctrine, the Supreme Court counsels courts "to adopt constructions of statutes to 'avoid decision of constitutional questions,' not to deliberately create constitutional questions." *See, e.g.*, *McConnell v. Federal Election Commission*, 540 U.S. 93, 180 (2003); *United States v. 37 Photographs*, 402 U.S. 363, 373 (1971), *United States ex rel. Attorney General v. Delaware and Hudson Co.*, 213 U.S. 366, 407 (1909); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

Branzburg should lead to an opposite result, I think that argument should appropriately be made to the Supreme Court, not the lower courts.[3]

Even if appellants are correct that we would have the power to adopt such a privilege in the face of the *Branzburg* precedent, I nonetheless would not accept that invitation. Appellants' argument for our authority to adopt the new privilege begins with the Federal Rules of Evidence. Rule 501, enacted by Congress in the Federal Rules of Evidence in 1975, three years after *Branzburg*, rejected an enumeration of specific federal privileges and provided that privileges in federal criminal cases "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Although the rules became effective after *Branzburg*, Rule 501 does not effect any change in the authority of federal courts to adopt evidentiary privileges. Before the enactment of the Federal Rules of Evidence, the authority of the federal courts to adopt common law privileges was governed by case law. The relevant case law provided for precisely the same authority as Congress enacted in the rules. Indeed, the language of the rule is drawn directly from case law governing at the time of *Branzburg*. The Supreme Court expressly held in *Wolfle v. United States*, 291 U.S. 7 (1934), that

> the rules governing the competence of witnesses in criminal trials in the federal

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[3] I wish to make it plain that I do not fault the appellants for making the argument, understanding that they must if they wish to preserve it for Supreme Court review. Nonetheless, I think it is only the High Court and not this one that may act upon that argument.

> courts are not necessarily restricted to those local rules enforced at the time of the admission into the union of the particular state where the trial takes place, but are governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience.

291 U.S. 7, 12 (1934) (citing *Funk v. United States*, 290 U.S. 371 (1933)) (emphasis added). Given the venerable origins of the language used in Rule 501, it cannot be said that the courts have more power to adopt privileges today than at the time of *Branzburg*. The power is precisely the same. Thus, the enactment of Rule 501 cannot by itself work any change in the law which should empower us to depart from the Supreme Court's clear precedent in *Branzburg*.

Appellants persist, however, that the state of the common law has changed sufficiently to warrant a new approach. By appellants' count, at the time of the *Branzburg* decision, only seventeen states had enacted what appellants refer to as "shield laws" to protect journalists from forced disclosure of confidential sources or newsgathering materials, while today, thirty-one states (plus the District of Columbia) have such statutes.[4] Nonetheless, I think it

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[4] The fact that the adoption has been by legislation rather than court decision does not deprive the change in law of common law force. As the Supreme Court has noted, "the policy decisions of the states bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one[,]" and further has told us that "it is of no consequence that recognition of the privilege in the vast majority of the states is the product of legislative action rather than judicial decision." *Jaffee v. Redmond*, 518 U.S. 1, 12-13 (1996).

remains the prerogative of the Supreme Court rather than inferior federal tribunals to determine whether these changes are sufficient to warrant an overruling of the Court's rejection of such a common law privilege in *Branzburg*.

Furthermore, even if we are authorized to make that decision, reasons of policy and separation of powers counsel against our exercising that authority. While I concede that the adoption of the "shield" by legislation rather than judicial fiat does not prevent the change being considered by the courts in assessing the common law, I find the adoption of the privilege by the legislatures of the states instructive as to how the federal government should proceed, if at all, to adopt the privilege. The statutes differ greatly as to the scope of the privilege, and as to the identity of persons entitled to the protection of the privilege. We have alluded in the majority opinion to the differing decisions of courts as to civil, criminal, and grand jury proceedings. There is also a more fundamental policy question involved in the crafting of such a privilege.

The Supreme Court itself in *Branzburg* noted the difficult and vexing nature of this question, observing that applying such privilege would make it

> necessary to define those categories of newsmen who qualify for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.

408 U.S. at 704. The Supreme Court went on to observe that "freedom of the press is a 'fundamental personal right . . . not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets .... The press in its historic connotation comprehends every sort of publication

which affords a vehicle of information and opinion.'" *Id.* (quoting *Lovell v. Griffin*, 304 U.S. 444, 450, 452 (1938)). Are we then to create a privilege that protects only those reporters employed by Time Magazine, the New York Times, and other media giants, or do we extend that protection as well to the owner of a desktop printer producing a weekly newsletter to inform his neighbors, lodge brothers, co-religionists, or co-conspirators? Perhaps more to the point today, does the privilege also protect the proprietor of a web log: the stereotypical "blogger" sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way? If not, why not? How could one draw a distinction consistent with the court's vision of a broadly granted personal right? If so, then would it not be possible for a government official wishing to engage in the sort of unlawful leaking under investigation in the present controversy to call a trusted friend or a political ally, advise him to set up a web log (which I understand takes about three minutes) and then leak to him under a promise of confidentiality the information which the law forbids the official to disclose?

The state legislatures have dealt with this vexing question of entitlement to the privilege in a variety of ways. Some are quite restrictive. Alabama limits its protection to "person[s] engaged in, connected with, or employed on any newspaper, radio broadcasting station or television station, while engaged in a newsgathering capacity." ALA. CODE § 12-21-142. Alaska's statutes protect only the "reporter," a category limited to "person[s] regularly engaged in the business of collecting or writing news for publication or presentation to the public, through a news organization." ALASKA STAT. § 09.25.300. The statutory privilege in Arizona protects "a person engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper or radio or television station . . . ." ARIZ. REV. STAT. § 12-2237. Arkansas's legislature has declared

the privilege applicable to "any editor, reporter, or other writer for any newspaper, periodical, or radio station, or publisher of any newspaper or periodical, or manager or owner of any radio station . . . ." ARK. CODE ANN. § 16-85-510. Delaware is perhaps the most specific, protecting a "reporter," which

> means any journalist, scholar, educator, polemicist, or other individual who either: (a) At the time he or she obtained the information that is sought was earning his or her principal livelihood by, or in each of the preceding 3 weeks or 4 of the preceding 8 weeks had spent at least 20 hours engaged in the practice of, obtaining or preparing information for dissemination with the aid of facilities for the mass reproduction of words, sounds, or images in a form available to the general public; or (b) Obtained the information that is sought while serving in the capacity of an agent, assistant, employee, or supervisor of an individual who qualifies as a reporter under subparagraph a.

DEL. CODE ANN. tit. 10 § 4320. Presumably, states such as these would provide the privilege only to the "established" press.

Others are quite inclusive. The Nebraska legislature, for example, has declared:

> (1) That the policy of the State of Nebraska is to insure the free flow of news and other information to the public, and that those who gather, write, or edit information for the public or disseminate information to the public may perform these vital functions only in a free and unfettered atmosphere; (2) That such persons shall not be inhibited, directly or

> indirectly, by governmental restraint or sanction imposed by governmental process, but rather that they shall be encouraged to gather, write, edit, or disseminate news or other information vigorously so that the public may be fully informed.

NEB. REV. STAT. § 20-144. To that end, it protects any "medium of communication" which term "shall include, *but not be limited to*, any newspaper, magazine, other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system." *Id.* at § 20-145(2) (emphasis added).

In defining the persons protected by that privilege, Nebraska tells us that "Person shall mean any individual, partnership, limited liability company, corporation, association, or other legal entity existing under or authorized by the law of the United States, any state or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any foreign country." *Id.* at 20-145(7). Presumably, then, Nebraska, perhaps more in keeping with the spirit of the recent revolutionaries who gave us the First Amendment, protects the pamphleteer at the rented printer, and the blogger at the PC, as well as the giant corporation with its New York publishing house.

The variety of legislative choices among the states only serves to heighten the concern expressed by the majority in *Branzburg*. *See* 408 U.S. at 704. This concern is reinforced by examination of the *Jaffee* decision, upon which appellants rely. In *Jaffee*, the Supreme Court extended a federal privilege "to confidential communications made to licensed social workers in the course of psychotherapy." 518 U.S. at 15. There is little definitional problem with the application of this privilege. The court need only ask: Does this "social worker" have a license? If the answer is "yes," then the privilege applies; if it's "no," the privilege does not. If the

courts extend the privilege only to a defined group of reporters, are we in danger of creating a "licensed" or "established" press? If we do so, have we run afoul of the breadth of the freedom of the press, that "fundamental personal right" for which the Court in *Branzburg* expressed its concern? 408 U.S. at 704. Conversely, if we extend that privilege to the easily created blog, or the ill-defined pamphleteer, have we defeated legitimate investigative ends of grand juries in cases like the leak of intelligence involved in the present investigation?

Nor does the identity of the protected persons constitute the only difficult policy decision. *Branzburg* enumerates several concerns. For example, does "the public interest in possible future news about crime from undisclosed, unverified sources . . . take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future"? *Id.* at 695. Do "agreements to conceal information relevant to the commission of crime avail little to recommend them from the standpoint of public policy"? *Id.* at 696. What are we to do with the historic common law recognition of "a duty to raise the 'hue and cry' and report felonies to the authorities"? *Id.* (*see also* authorities collected in *id.* at 696 n.34). Should we be creating immunity from prosecution for "misprision" of a felony—that is, the concealment of a felony? *Id.* at 696.

Should the privilege be absolute or limited? If limited, how limited? Without attempting to catalog, I note that the state statutes provide a variety of answers to that policy question. Therefore, if such a decision requires the resolution of so many difficult policy questions, many of them beyond the normal compass of a single case or controversy such as those with which the courts regularly deal, doesn't that decision smack of legislation more than adjudication? Here, I think the experience of the states is

most instructive. The creation of a reporter's privilege, if it is to be done at all, looks more like a legislative than an adjudicative decision. I suggest that the media as a whole, or at least those elements of the media concerned about this privilege, would better address those concerns to the Article I legislative branch for presentment to the Article II executive than to the Article III courts.

For all the reasons set forth above, I would hold that there is no common law privilege protecting reporters or any other news media personnel, no matter how defined, from the reach of grand jury subpoenas on claim of confidentiality.

HENDERSON, *Circuit Judge*, concurring: I write separately to emphasize that adherence to the principle of judicial restraint—patience in judicial decision-making—would produce a better result in II.B of the majority opinion. Because my colleagues and I agree that any federal common-law reporter's privilege that may exist is not absolute and that the Special Counsel's evidence defeats whatever privilege we may fashion, we need not, and therefore should not, decide anything more today than that the Special Counsel's evidentiary proffer overcomes any hurdle, however high, a federal common-law reporter's privilege may erect.

In our circuit it is a venerable practice, and one frequently observed, to assume *arguendo* the answer to one question—*e.g.*, whether to recognize a federal common-law reporter's privilege—in order to resolve a given case by answering another and equally dispositive one—*e.g.*, whether *any* privilege would protect these reporters.[1] Although both

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[1] *See, e.g., Dir., Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1308 (D.C. Cir. 1997) (because appellant failed to show sufficient need for attorney interview notes, court "save[d] for another day" "difficult matters" of determining "degree of selection necessary to transform facts into opinions and the standard of review we should employ of a district court determination" regarding discovery of attorney work product); *Littlewolf v. Lujan*, 877 F.2d 1058, 1065 (D.C. Cir. 1989) ("find[ing] it unnecessary to address the difficult questions raised by appellants regarding the Due Process adequacy of the period provided by the Act" because "[e]ven if we assume arguendo that the six-month limitations period is unreasonably short and that, as a consequence, the Act effectively 'takes' the Band members' property rights, we conclude that the statute provides the Indians with just compensation"); *cf. Michel v. INS*, 206 F.3d 253, 260 n.4

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of my colleagues question the logic of this approach here, it is a mode of decisionmaking they themselves have often used.[2] In this case, however, they employ two divergent

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(2d Cir. 2000) ("Where . . . no harm results from our failing to answer a question, we believe that the 'doctrine of judicial restraint provides a fully adequate justification for deciding [the] case on the best and narrowest ground available.'" (quoting *Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 531 (1991) (Stevens, J., concurring in judgment))).

[2] *See, e.g.*, *Tradesmen Int'l, Inc. v. NLRB*, 275 F.3d 1137, 1142 (D.C. Cir. 2002) (Sentelle, J.) (assuming union organizer's activity constituted "concerted activity" under 29 U.S.C. § 157 but holding it was not protected under statute); *Jackson v. Dist. of Columbia*, 254 F.3d 262, 265 (D.C. Cir. 2001) (Tatel, J.) ("continu[ing]" assumption that Religious Freedom Restoration Act applies to federal government and holding prisoners failed to exhaust administrative remedies); *Carney v. Am. Univ.*, 151 F.3d 1090, 1094-95 (D.C. Cir. 1998) (Tatel, J.) (assuming without deciding retaliation violates 42 U.S.C. § 1981 and remanding claim for trial); *Massachusetts. v. United States Dep't of Transp.*, 93 F.3d 890, 892 (D.C. Cir. 1996) (Sentelle, J.) ("We need not determine whether an agency's interpretation of a statute on the preemption question is subject to *Chevron* analysis in order to decide this case, as the agency's determination here cannot be upheld with or without deference.").

Judge Tatel distinguishes these cases by concluding that their analysis cannot be used to avoid the "dispositive" issue in this case. Tatel Slip Op. at 8. There are, however, only three ways of answering the question whether these reporters' confidential source information is protected by a federal common-law privilege: (1) there is no privilege, (2) there is an absolute privilege

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forms of "wide-angle adjudication." *See* Harry T. Edwards, *The Role of the Judge in Modern Society: Some Reflections on Current Practices in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 414 (1983-84). Judge Sentelle would hold that a reporter enjoys no federal commonlaw privilege to refuse to provide a bona fide grand jury with relevant documents and testimony while Judge Tatel would fix the contours of a qualified reporter's privilege by using a novel multi-factor balancing test only to conclude that it helps these reporters not at all.[3]

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and (3) there is a qualified privilege. None of us, including the reporters in their brief, would choose door number two, see Tatel Slip Op. at 19; Appellants' Br. at 42, and only one of us heads for door number one, see Sentelle Slip Op. at 1. That leaves door number three. But in choosing this route, the critical question is not definitional, as Judge Tatel sees it, see Tatel Slip Op. at 8, but quantitative: Is the Special Counsel's evidentiary proffer *sufficient* to overcome any qualified privilege that may exist? Because we agree that the answer is "yes," there is no need for us to go any further. Granted, the circumstances of the cited cases differ but they use the same analysis. Moreover, its application here is consistent with the tried and true principle that "[w]here . . . no harm results from our failing to answer a question, . . . the 'doctrine of judicial restraint provides a fully adequate justification for deciding [the] case on the best and narrowest ground available.'" *Michel*, 206 F.3d at 260 n.4 (quoting *Air Courier Conference of Am.*, 498 U.S. at 531 (Stevens, J., concurring in judgment)); *see supra* note 2.

[3] Judge Tatel maintains that "[f]or the sake of reporters and sources," we must establish the contours of a privilege in order to "clarify the rules governing their relationship." Tatel Slip Op. at 9. But the press's collection of information, including from

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While I am convinced that we need not, and therefore should not, go further than to conclude, as did the district court, *see* Appendix 35-36, 275, that the Special Counsel's showing decides the case, I feel compelled to comment briefly on my colleagues' opposing conclusions if only to make clear why I think it unwise to advance either of them. I cannot agree with Judge Sentelle's conclusion that the United States Supreme Court has answered the question we now avoid. *Branzburg v. Hayes* addressed only "whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the *First Amendment*" and "h[e]ld that it does not." 408 U.S. 665, 667 (1972) (emphases added). The boundaries of constitutional law and common law do not necessarily coincide, however, and while we are unquestionably bound by *Branzburg*'s rejection of a reporter's privilege rooted in the First Amendment, we are not bound by *Branzburg*'s commentary on the state of the common law in 1972. Federal Rule of Evidence 501, which came into being nearly three years after *Branzburg*, authorizes federal courts to develop testimonial privileges "in the light of reason and experience," allowing for the often

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confidential sources, seems to me near impervious to regulation: "[E]xperience teaches us more than sufficiently that men have nothing less in their power than their tongue . . . ." BENEDICT DE SPINOZA, ETHICS 168 (G.H.R. Parkinson ed. & trans., Oxford Univ. Press 2000); *cf.* STANLEY WALKER, CITY EDITOR 44 (Johns Hopkins Univ. Press 1999) (1934) ("Women, wampum, and wrongdoing are always news."). As the *Branzburg* Court recognized, "the relationship of many informants to the press is a symbiotic one which is unlikely to be greatly inhibited by the threat of subpoena." 408 U.S. 665, 694 (1972).

evolving state of the common law. *See* FED. R. EVID. 501; *Trammel v. United States*, 445 U.S. 40, 47 (1980) ("In rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege."); *id.* ("The Federal Rules of Evidence acknowledge the authority of the federal courts to continue the evolutionary development of testimonial privileges."). Judge Sentelle's view also discounts the fact that, even as they rejected a reporter's First Amendment right to withhold testimony from a bona fide grand jury, both the *Branzburg* majority opinion as well as Justice Powell's separate concurrence hint ambiguously at the existence of some special protection for reporters stemming from their significant role in sustaining our republican form of government.[4]

At the same time, I am far less eager a federal common-law pioneer than Judge Tatel as I find less comfort than he in riding *Jaffee v. Redmond*, 518 U.S. 1 (1996), into the testimonial privilege frontier. Just as Rule 501 imposes no

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[4] *See Branzburg*, 408 U.S. at 708 ("[N]ews gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment."); *id.* at 710 ("The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.") (Powell, J., concurring); *see also In re Grand Jury*, 955 F.2d 229, 434 (4th Cir. 1992) (noting *Branzburg*'s observation that First Amendment protects reporter in grand jury proceedings initiated or conducted in bad faith presents a "paradox" because "district courts can control prosecutorial abuse in any setting, not just in cases involving the First Amendment").

"freeze" on the development of the common law, *see Univ. of Penn. v. EEOC*, 493 U.S. 182, 189 (1990); *Trammel*, 445 U.S. at 47, it likewise does not authorize federal courts to mint testimonial privileges for any group—including the "journalistic class," as Judge Sentelle dubs it, Maj. Slip Op. at 15—that demands one. The Supreme Court has warned that testimonial privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974); *see Branzburg*, 408 U.S. at 690; *see also Jaffee*, 518 U.S. at 21 (Scalia, J., dissenting). Accordingly, we should proceed as cautiously as possible "when erecting barriers between us and the truth," *id.*, recognizing that the Legislature remains the more appropriate institution to reconcile the competing interests—prosecuting criminal acts versus constricting the flow of information to the public—that inform any reporter's privilege to withhold relevant information from a bona fide grand jury. *See Univ. of Penn.*, 493 U.S. at 189.

Because *Jaffee* sits rather awkwardly within a jurisprudence marked by a fairly uniform disinclination to announce new privileges[5] or even expand existing ones,[6] and

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[5] *See Univ. of Penn.*, 493 U.S. 182 (rejecting privilege protecting academic peer-review materials); *United States v. Gillock*, 445 U.S. 360 (1980) (rejecting privilege protecting "legislative acts"); *see also Jaffee*, 518 U.S. at 18-36 (Scalia, J., dissenting).

[6] *See United States v. Zolin*, 491 U.S. 554 (1989) (permitting *in camera* review of materials to establish applicability of crime-fraud exception to attorney-client privilege); *Trammel v. United States*, 445 U.S. 40 (1980) (witness spouse's voluntary testimony

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even though it enjoyed the support of an overwhelming majority, I am hesitant to apply its methodology to a case that does not require us to do so. While it would not be the first of its kind, *see Lemon v. Kurtzman*, 403 U.S. 602 (1971) ("*Lemon* test"); *cf. Elk Grove Unified Sch. Dist. v. Newdow*, __ U.S. __, 124 S. Ct. 2301, 2327 n.1 (2004) ("We have selectively invoked particular tests, such as the '*Lemon* test,' with predictable outcomes." (internal citation omitted)) (Thomas, J., concurring in judgment), the type of multi-factor balancing test Judge Tatel proposes seems, at least to me, to lack analytical rigor because its application to this case is foreordained. Indeed, I am not convinced that a balancing test that requires more than an evaluation of the essentiality of the information to the prosecution and the exhaustion of available alternative sources thereof is either useful or appropriate. While Judge Tatel makes the centerpiece of his test the balancing of "the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value," *see* Tatel Slip Op. at 21, this court (in the civil context),[7] the United States Department of Justice[8]

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not covered by spousal privilege); *see also Jaffee*, 518 U.S. at 18-36 (Scalia, J., dissenting).

[7] *Zerilli v. Smith*, 656 F.2d 705, 713-714 (D.C. Cir. 1981); *Carey v. Hume*, 492 F.2d 631, 636-38 (D.C. Cir. 1972); *cf. United States v. Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2000) (affirming district court's conclusion that reporter's privilege was not overcome because his testimony was not "'essential or crucial'" to defendant's case or relevant to determination of guilt or innocence).

and the lone district court that has recognized a federal common-law reporter's privilege in the grand jury context[9] have declined to consider either of these factors in deciding whether to recognize a reporter's exemption from

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[8] *See* 28 C.F.R. § 50.10. As Judge Tatel points out, *see* Tatel Slip Op. at 20, the Justice Department regulations aim to "strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice," *id.* § 50.10(a), but the regulations do not balance the two interests. They establish instead that, in requesting authorization to subpoena a member of the press, the government should: reasonably believe that, in a criminal case, the information sought is essential "to a successful investigation—particularly with reference to directly establishing guilt or innocence," *id.* § 50.10(f)(1); attempt unsuccessfully to obtain the information from "alternative nonmedia sources," *id.* § 50.10(f)(3); seek only to verify, "except under exigent circumstances," published information and "such surrounding circumstances as relate to the accuracy of the published information," *id.* § 50.10(f)(4); treat "[e]ven" requests for publicly disclosed information "with care to avoid claims of harassment," *id.* § 50.10(f)(5); and, "wherever possible," seek material information on a limited subject matter and for a limited time period, avoid requiring the production of large quantities of unpublished material and "give reasonable and timely notice of the demand for documents," *id.* § 50.10(f)(6).

[9] *See In re Williams*, 766 F. Supp. 358, 368-70 (W.D. Pa. 1991), *aff'd by equally divided court*, 963 F.2d 567 (3d Cir. 1992) (en banc) (order without treatment of merits).

compulsory process.[10] There is a good reason for this: I suspect that balancing "harm" against "news value" may prove unproductive because in most of the projected scenarios—leaks of information involving, for example, military operations, national security, policy choices or political adversaries—the two interests overlap. Furthermore, *Branzburg* warns of the risk inherent in the judicial assessment of the importance of prosecuting particular crimes. *See* 408 U.S. at 706 ("By requiring testimony from a reporter in investigations involving some crimes but not in others, [the courts] would be making a value judgment that a legislature had declined to make, since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution. The task of judges, like other officials outside the legislative branch, is not to make the law but to uphold it in accordance with their oaths."). And any evaluation of the importance of newsgathering keyed to its perceived "benefit" to the public, Tatel Slip Op. at 20; *see id.* at 27 ("beneficial newsgathering"), seems antithetical to our nation's abiding commitment to the uninhibited trade in ideas. *See, e.g.*, *Riley v. Nat'l Fed'n of Blind, Inc.*, 487 U.S. 781, 790-91 (1988) ("The First Amendment mandates that we presume that

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[10] Judge Tatel insists that his test is not "novel . . . , considering its basis in *Zerilli* and *Carey* and the Justice Department's own guidelines." Tatel Slip Op. at 22. But the central factors of his test—the balancing of "the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value," Tatel Slip Op. at 21—find no support that I can detect in those cases. *See* 28 C.F.R. § 50.10; *Zerilli*, 656 F.2d at 713-714; *Carey*, 492 F.2d at 636-38.

speakers, not the government, know best both what they want to say and how to say it."); *Cohen v. California*, 403 U.S. 15, 24 (1971) ("The constitutional right of free expression is . . . designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us."); *McConnell v. FEC*, 251 F. Supp. 2d 176, 360 (D.D.C. 2003) ("[T]he First Amendment delegates to the populace at large the responsibility of conducting an 'uninhibited, robust, and wide-open' debate." (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964))); *cf. Gertz v. Welch, Inc.*, 418 U.S. 323, 346 (1974). Moreover, to attempt to establish the contours of a reporter's privilege here would tend, unnecessarily, to leave a future panel less maneuverability in a case that might require just that to achieve justice. On this score, Judge Tatel levels the identical charge against my approach, *see* Tatel Slip Op. at 8, but I fail to see how declining to decide whether a reporter's privilege exists or to define its contours could confine a future panel.

For the foregoing reasons, I am convinced that the court would chart the best course by charting the narrowest one and, accordingly, concur only in the judgment with respect to II.B of the majority opinion. In all other respects, I fully concur.

TATEL, *Circuit Judge*, concurring in the judgment: This case involves a clash between two truth-seeking institutions: the grand jury and the press. On the one hand, the grand jury, a body "deeply rooted in Anglo-American history" and guaranteed by the Fifth Amendment, *see United States v. Calandra*, 414 U.S. 338, 342-43 (1974), holds "broad powers" to collect evidence through judicially enforceable subpoenas. *See United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 423-24 (1983). "Without thorough and effective investigation, the grand jury would be unable either to ferret out crimes deserving of prosecution, or to screen out charges not warranting prosecution." *Id.* at 424. On the other hand, the press, shielded by the First Amendment, "has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences." *Estes v. Texas*, 381 U.S. 532, 539 (1965). Using language we have quoted with approval, *see Carey v. Hume*, 492 F.2d 631, 634-35 (D.C. Cir. 1974), the Second Circuit aptly described this conflict between press freedom and the rule of law: "Freedom of the press, hard-won over the centuries by men of courage, is basic to a free society. But basic too are courts of justice, armed with the power to discover truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press." *Garland v. Torre*, 259 F.2d 545, 548 (2d Cir. 1958).

Because I agree that the balance in this case, which involves the alleged exposure of a covert agent, favors compelling the reporters' testimony, I join the judgment of the court. I write separately, however, because I find *Branzburg v. Hayes*, 408 U.S. 665 (1972), more ambiguous than do my colleagues and because I believe that the consensus of forty-nine states plus the District of Columbia—and even the Department of Justice—would

require us to protect reporters' sources as a matter of federal common law were the leak at issue either less harmful or more newsworthy.

I.

Although I join the court's rejection of appellants' First Amendment argument, I am uncertain that *Branzburg* offers "no support" for a constitutional reporter privilege in the grand jury context. *See* majority op. at 12-13. To be sure, *Branzburg* upheld the enforcement of subpoenas seeking confidential source information, including notes and testimony about interviews and observations at a militant group's headquarters. *See* 408 U.S. at 672-77. Yet even the *Branzburg* majority declared that "news gathering is not without its First Amendment protections," *id.* at 707, a phrase we have interpreted (albeit in dictum) to "indicate[] that a qualified privilege would be available in some circumstances even where a reporter is called before a grand jury to testify," *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981). *Branzburg*'s caveat, placed in a discussion of "[o]fficial harassment of the press" and "grand jury investigations . . . instituted or conducted other than in good faith," *Branzburg*, 408 U.S. at 707-08, seems to refer only to journalists' power to quash "unreasonable or oppressive" subpoenas, *see* Fed. R. Crim. P. 17(c)(2). But given that any witness—journalist or otherwise—may challenge such a subpoena, the majority must have meant, at the very least, that the First Amendment demands a broader notion of "harassment" for journalists than for other witnesses. Reinforcing that view, the majority added, "We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth." *Branzburg*, 408 U.S. at 708. That prediction, too, would appear meaningless if no First Amendment safeguards existed for subpoenaed reporters.

Then there is Justice Powell's "enigmatic concurring opinion." *Id.* at 725 (Stewart, J., dissenting). Though providing the majority's essential fifth vote, he wrote separately to outline a "case-by-case" approach, *see id.* at 710 (Powell, J., concurring), that fits uncomfortably, to say the least, with the *Branzburg* majority's categorical rejection of the reporters' claims. Emphasizing "the limited nature of the Court's holding," *id.* at 709, he wrote:

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

Id. at 710. "In short," Justice Powell concluded, "the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection." *Id.* Even more than the majority opinion, this language places limits on grand jury authority to demand information about source identities—though, again, the precise extent of those limits seems unclear.

Given *Branzburg*'s internal confusion and the "obvious First Amendment problems" involved in "[c]ompelling a reporter to disclose the identity of a confidential source," *Zerilli*, 656 F.2d at 710, it is hardly surprising that lower courts have, as Chief Judge Hogan put it, "chipped away at the holding of *Branzburg*," finding constitutional protections for reporters in "various factual scenarios different than those presented in *Branzburg*." *In re Special Counsel Investigation*, 332 F. Supp. 2d 26, 31 (D.D.C. 2004). We ourselves have affirmed the denial of a criminal defense subpoena on grounds that the defendant "failed to carry his

burden" of "demonstrat[ing] that the reporters' qualified privilege should be overcome." *United States v. Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2000). In civil litigation, moreover, we have held that the First Amendment requires courts to "look to the facts on a case-by-case basis in the course of weighing the need for the testimony in question against the claims of the newsman that the public's right to know is impaired." *Carey*, 492 F.2d at 636; *see also Zerilli*, 656 F.2d at 707 (affirming the denial of a motion to compel discovery because "in this case the First Amendment interest in protecting a news reporter's sources outweighs the interest in compelled disclosure"). Other circuits have reached similar conclusions. *See, e.g.*, *United States v. LaRouche Campaign*, 841 F.2d 1176, 1180-81 (1st Cir. 1988) (acknowledging First Amendment limits on criminal defense subpoenas directed at news organizations); *United States v. Burke*, 700 F.2d 70, 76-77 (2d Cir. 1983) (extending a First Amendment reporter privilege developed in civil cases to a criminal defense subpoena); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 593-99 (1st Cir. 1980) (describing First Amendment limits on discovery of reporters' sources in civil litigation); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977) (indicating that a qualified newsgathering privilege "is no longer in doubt"); *but see In re Grand Jury Proceedings*, 810 F.2d 580, 584-85 (6th Cir. 1987) (rejecting claims of First Amendment privilege in grand jury proceedings).

In this case, however, our hands are tied for two independent reasons. First, although this circuit has limited *Branzburg* in other contexts, *see Zerilli*, 656 F.2d at 707; *Carey*, 492 F.2d at 636; *Ahn*, 231 F.3d at 37, with respect to criminal investigations we have twice construed that decision broadly. In *Reporters Committee for Freedom of the Press v. AT&T*, 593 F.2d 1030 (D.C. Cir. 1978), which addressed a First Amendment challenge regarding access to journalists' phone records and describing *Branzburg* as foreclosing

"case-by-case consideration," we declared, "Good faith investigation interests always override a journalist's interest in protecting his source." *Id.* at 1049 (emphasis added). Echoing this broad view, we have also described Branzburg as "squarely reject[ing]" a claim to "general immunity, qualified or otherwise, from grand jury questioning." *See In re Possible Violations of 18 U.S.C. 371, 641, 1503*, 564 F.2d 567, 571 (D.C. Cir. 1977). In this circuit, then, absent any indication of bad faith, I see no grounds for a First Amendment challenge to the subpoenas at issue here.

Second, although *Branzburg* involved militants and drug dealers rather than government leakers, the factual parallels between that case and this one preclude us from quashing the subpoenas on constitutional grounds. *See* majority op. at 10. If, as *Branzburg* concludes, the First Amendment permits compulsion of reporters' testimony about individuals manufacturing drugs or plotting against the government, *see* 408 U.S. at 667-69, 675-77, all information the government could have obtained from an undercover investigation of its own, the case for a constitutional privilege appears weak indeed with respect to leaks, which in all likelihood will be extremely difficult to prove without the reporter's aid. Thus, if *Branzburg* is to be limited or distinguished in the circumstances of this case, we must leave that task to the Supreme Court.

II.

But *Branzburg* is not the end of the story. In 1975—three years after *Branzburg*—Congress enacted Rule 501 of the Federal Rules of Evidence, authorizing federal courts to develop evidentiary privileges in federal question cases according to "the principles of the common law as they may be interpreted . . . in the light of reason and experience." Fed. R. Evid. 501; *see also* Pub. L. No. 93-595, 88 Stat. 1926 (1975). Given *Branzburg*'s instruction that "Congress has freedom to determine whether a statutory newsman's

privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned," 408 U.S. at 706, Rule 501's delegation of congressional authority requires that we look anew at the "necess[ity] and desirab[ility]" of the reporter privilege—though from a common law perspective.

Under Rule 501, that common lawmaking obligation exists whether or not, absent the rule's delegation, Congress would be "the more appropriate institution to reconcile the competing interests . . . that inform any reporter's privilege to withhold relevant information from a bona fide grand jury." Sep. op. at 5 (Henderson, J., concurring) (citing *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990)); *but see* sep. op at 4-5 (Sentelle, J., concurring) (observing that even before Rule 501, case law provided federal courts with "precisely the same authority" to recognize common law privileges) (citing *Wolfle v. United States*, 291 U.S. 7, 12 (1934)); *Univ. of Pa.*, 493 U.S. at 189 (declining to recognize a privilege "where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself"). As the Supreme Court has explained, "Rule 501 was adopted precisely because Congress wished to leave privilege questions to the courts rather than attempt to codify them." *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 803 n.25 (1984). Thus, subject of course to congressional override, we must assess the arguments for and against the claimed privilege, just as the Supreme Court has done in cases recognizing common law privileges since 1975. *See, e.g.*, *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996) (psychotherapist-patient); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (attorney-client); *Trammel v. United States*, 445 U.S. 40, 51 (1980) (confidential marital communications).

In this case, just as *Jaffee v. Redmond* recognized a common law psychotherapist privilege based on "the uniform

judgment of the States," 518 U.S. at 14, I believe that "reason and experience" dictate a privilege for reporters' confidential sources—albeit a qualified one. Guided by *Jaffee*'s reasoning, I reach this conclusion by considering first whether "reason and experience" justify recognizing a privilege at all, and if so whether the privilege should be qualified or absolute and whether it should cover the communications at issue in this case.

Before undertaking that analysis, I think it helpful to explain why, in my view, we should not, as would Judge Henderson, short-circuit *Jaffee*'s framework and decide whether the special counsel may overcome the reporter privilege without ever reaching the issue of whether the privilege in fact exists. *See* sep. op. at 1 (Henderson, J., concurring). Unless we conclude, as does Judge Sentelle, *see* sep. op. at 1 (Sentelle, J., concurring), and as did the district court, *see In re Special Counsel Investigation*, 338 F. Supp. 2d 16, 18-19 (D.D.C. 2004), that no privilege exists, we cannot resolve this case without adopting some standard. Judge Henderson criticizes my approach, but she never indicates what standard she would apply, except to state that "the Special Counsel's evidentiary proffer overcomes any hurdle, however high, a federal commonlaw reporter's privilege may erect." *See* sep. op. at 1 (Henderson, J., concurring). To reach even that conclusion, however, one must explain why federal common law cannot support any higher "hurdle," such as an absolute privilege for source identities, which exists in the District of Columbia and several states, *see, e.g.*, D.C. Code Ann. §§ 16-4702, 16-4703(b); 42 Pa. Cons. Stat. § 5942; Ala. Code § 12-21-142, or a privilege that applies unless non-disclosure "will cause a miscarriage of justice," N.D. Cent. Code § 31-01-06.2; *see also* Minn. Stat. § 595.024; N.M. Stat. Ann. § 38-6-7. Without ruling out all such plausible alternatives that would allow the reporters to prevail, how could one know that they cannot prevail here? And without selecting some other test

based on *Jaffee* and Rule 501, how could one know that no such alternatives are plausible?

Because the *Jaffee* analysis is thus essential to resolving this case (assuming a privilege exists), our frequent practice of avoiding non-essential issues is inapplicable. To be sure, declining to resolve waived issues, *see, e.g.*, *Carney v. Am. Univ.*, 151 F.3d 1090, 1094-95 (D.C. Cir. 1998), disposing of procedurally defective claims without reaching the merits, *see, e.g.*, *Jackson v. District of Columbia*, 254 F.3d 262, 264, 270-71 (D.C. Cir. 2001); *cf. Massachusetts v. U.S. Dep't of Transp.*, 93 F.3d 890, 891 (D.C. Cir. 1996) (assuming deferential review because even under that standard agency action was unreasonable), and expressing no view on one element of a claim because another element is clearly defective, *see, e.g.*, *Tradesmen Int'l, Inc. v. NLRB*, 275 F.3d 1137, 1142 (D.C. Cir. 2002); *Dir., Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1308 (D.C. Cir. 1997); *Littlewolf v. Lujan*, 877 F.2d 1058, 1060 (D.C. Cir. 1989), may well represent "patience in judicial decision-making," sep. op. at 1 (Henderson, J., concurring). Patience, however, cannot justify "declining . . . to define [the disputed privilege's] contours," *see id.* at 9, for that is the dispositive issue in this case.

Accordingly, given that we must apply some test to the government's showing, if we simply assume the privilege exists but our assumption is wrong, then we will have reached out to establish a framework for a non-existent claim—an undertaking hardly consistent with principles of judicial restraint. Indeed, our decision would establish a precedent, potentially binding on future panels, regarding the scope of the assumed privilege, even though resolving that question was entirely unnecessary. Therefore, I think it imperative to decide as a threshold matter whether the privilege exists, turning only afterwards to the privilege's specific contours.

In this case, moreover, the issue of the privilege's existence is fully briefed, and resolving it definitively will provide critical guidance in similar situations in the future. This is not the only case to raise reporter privilege issues in D.C. federal courts in recent years. *See Lee v. U.S. Dep't of Justice*, 327 F. Supp. 2d 26 (D.D.C. 2004); *Lee v. U.S. Dep't of Justice*, 287 F. Supp. 2d 15 (D.D.C. 2003). And given the many leaks that no doubt occur in this city every day, it would be naive to suppose that it will be the last. For the sake of reporters and sources whom such litigation may ensnare, we should take this opportunity to clarify the rules governing their relationship.

Thus, I agree with Judge Sentelle that "the question of the existence of such privilege *vel non* is logically anterior to the quantum of proof necessary to overcome it." Sep. op. at 1 (Sentelle, J., concurring). Without resolving the first question, we cannot and should not decide the second.

Existence of the Privilege

Under Jaffee, the common law analysis starts with the interests that call for recognizing a privilege. *See* 518 U.S. at 11. If, as the Supreme Court held there, "[t]he mental health of our citizenry is a public good of transcendent importance," id.—one that trumps the "fundamental maxim that the public has a right to every man's evidence," *id.* at 9 (internal quotation marks and ellipsis omitted)—then surely press freedom is no less important, given journalism's vital role in our democracy. Indeed, while the *Jaffee* dissenters questioned psychotherapy's "indispensable role in the maintenance of the citizenry's mental health," *see id.* at 22 (Scalia, J., dissenting), the First Amendment's express protection for "freedom . . . of the press" forecloses any debate about that institution's "important role in the discussion of public affairs," *Mills v. Alabama*, 384 U.S. 214, 219 (1966). "Whatever differences may exist about interpretations of the First Amendment, there is practically

universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Brown v. Hartlage*, 456 U.S. 45, 52 (1982) (quoting *Mills*, 384 U.S. at 218-19).

Like psychotherapists, as well as attorneys and spouses, all of whom enjoy privileges under Rule 501, *see, e.g.*, *Jaffee*, 518 U.S. at 18 (psychotherapists); *Upjohn Co.*, 449 U.S. at 389 (attorneys); *SEC v. Lavin*, 111 F.3d 921, 925 (D.C. Cir. 1997) (spouses), reporters "depend[] upon an atmosphere of confidence and trust," *Jaffee*, 518 U.S. at 10. If litigants and investigators could easily discover journalists' sources, the press's truth-seeking function would be severely impaired. Reporters could reprint government statements, but not ferret out underlying disagreements among officials; they could cover public governmental actions, but would have great difficulty getting potential whistleblowers to talk about government misdeeds; they could report arrest statistics, but not garner firsthand information about the criminal underworld. Such valuable endeavors would be all but impossible, for just as mental patients who fear "embarrassment or disgrace," *id.*, will "surely be chilled" in seeking therapy, *id.* at 12, so will sources who fear identification avoid revealing information that could get them in trouble.

Because of these chilling effects, "[w]ithout a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being." *Id.* Consequently, as with other privileges, "the likely evidentiary benefit that would result from the denial of the privilege is modest." *Id.* At the same time, although suppression of some leaks is surely desirable (a point to which I shall return), the public harm that would flow from undermining all source relationships would be immense. For example, appellant Judith Miller tells us that her Pulitzer Prize-winning articles on Osama bin Laden's terrorist

network relied on "information received from confidential sources at the highest levels of our government." (Miller Aff. ¶ 10, Appellant's App. at 169.) Likewise, appellant Matthew Cooper maintains that his reports for "*Time*'s four million-plus readers about White House policy in Iraq, the chances of passage of major legislation such as Budget and Energy Bills, and the Clinton White House" would have been impossible without confidentiality. (Cooper Aff. ¶ 21, Appellant's App. at 286.) Insofar as such stories exemplify the press's role "as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve," *Mills*, 384 U.S. at 219, "reason and experience" support protecting newsgathering methods crucial to their genesis. Acknowledging as much in *Zerilli*, we emphasized that "[c]ompelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability" and weaken "a vital source of information," leaving citizens "far less able to make informed political, social, and economic choices." 656 F.2d at 711.

It is true, as the special counsel observes, that apart from affidavits and citations to two articles in their reply brief, the reporters present no empirical evidence that denial of the privilege "will have a significant impact on the free flow of information protected by the First Amendment." Appellee's Br. at 47. But the Supreme Court has never required proponents of a privilege to adduce scientific studies demonstrating the privilege's benefits. Rather, as the *Jaffee* dissenters pointed out, the empirical question—"[h]ow likely is it that a person will be deterred from seeking psychological counseling, or from being completely truthful in the course of such counseling, because of fear of later disclosure in litigation?"—was one "[t]he Court [did] not attempt to answer." 518 U.S. at 22-23 (Scalia, J., dissenting). Instead, following the wise precept that common sense need not be "the mere handmaiden of social science data or expert

testimonials," *Amatel v. Reno*, 156 F.3d 192, 199 (D.C. Cir. 1998), *Jaffee* relied on the traditional common law process: it examined the logical prerequisites of the confidential relationship, taking into account the policy and experience of parallel jurisdictions. *See Jaffee*, 518 U.S. at 10 (reasoning that given the need for "frank and complete disclosure of facts, emotions, memories, and fears" in psychotherapy, "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment").

Likewise, in *Trammel v. United States*, while justifying the privilege against adverse spousal testimony in terms of "marital harmony," 445 U.S. at 44-45, 53, the Court allowed waiver by the testifying spouse based not on divorce statistics or psychological studies, but rather on the commonsense supposition that "[w]hen one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair," *id.* at 52. And in *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), though finding the "empirical information . . . scant and inconclusive," *id.* at 410, the Court held that the attorney-client privilege survives the client's death because "[k]nowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel," *id.* at 407—a proposition the Court supported with neither evidence nor even citation. Given these decisions, the equally commonsense proposition that reporters' sources will be more candid when promised confidentiality requires no empirical support.

In any event, the special counsel's confidence that exposing sources will have no effect on newsgathering is unjustified. Citing the "'symbiotic' relationships between journalists and public officials," the special counsel presumes that leaks will go on with or without the privilege.

Appellee's Br. at 47 (quoting *Branzburg*, 408 U.S. at 694); *see also* sep. op. at 3 n.3 (Henderson, J., concurring). Not only does this contradict the Justice Department's own guidelines, which expressly recognize that revealing confidential sources can "impair the news gathering function," 28 C.F.R. § 50.10, but the available evidence suggests the special counsel is wrong. As anyone with even a passing interest in news knows, reporters routinely rely on sources speaking on condition of anonymity—a strong indication that leakers demand such protection. Besides, for all the reasons that lead me to conclude that a privilege exists, reporters and their editors, attorneys, and sources probably believe the same, making it speculative indeed for the special counsel to suppose that dashing that expectation of confidentiality would have no effect on newsgathering.

Turning next, as did *Jaffee*, to the consensus among states, I find support for the privilege at least as strong for journalists as for psychotherapists. Just as in *Jaffee*, where "the fact that all 50 states and the District of Columbia have enacted into law some form of psychotherapist privilege" favored an exercise of federal common lawmaking, *see* 518 U.S. at 12, so here undisputed evidence that forty-nine states plus the District of Columbia offer at least qualified protection to reporters' sources confirms that "'reason and experience' support recognition of the privilege," *id.* at 13. Indeed, given these state laws, "[d]enial of the federal privilege . . . would frustrate the purposes of the state legislation" by exposing confidences protected under state law to discovery in federal courts. *See id.*

Making the case for a privilege here even stronger than in *Jaffee*, federal authorities also favor recognizing a privilege for reporters' confidential sources. As noted earlier, we ourselves have limited discovery of reporters' sources in both civil and criminal litigation, *see Zerilli*, 656 F.2d at 707; *Carey*, 492 F.2d at 636; *Ahn*, 231 F.3d at 37, as

have other federal courts, *see, e.g.*, *Bruno & Stillman*, 633 F.2d at 593-99; *Burke*, 700 F.2d at 76-77; *Silkwood*, 563 F.2d at 436-37, including some acting on the basis of Rule 501, *see, e.g.*, *Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979) (recognizing a qualified common law privilege in civil litigation); *but see In re Grand Jury Proceedings*, 5 F.3d 397, 398 (9th Cir. 1993) (holding that no "scholar's privilege" exists under the First Amendment or common law). In addition, the Justice Department guidelines (though privately unenforceable, for reasons the court explains, *see* majority op. at 20-23) establish a federal policy of protecting "news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function." 28 C.F.R. § 50.10. Denial of the privilege, then, would not only buck the clear policy of virtually all states, but would also contradict regulations binding on the federal government's own lawyers.

Resisting this consensus, the special counsel asserts that *Branzburg* already performed the analysis required by Rule 501, thus "resolv[ing] the common law argument." Appellee's Br. at 35; *see also* sep. op. at 1-3 (Sentelle, J., concurring). *Branzburg* did no such thing. As the *Branzburg* majority's very first sentence makes plain, the "issue" in that case was "whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press *guaranteed by the First Amendment*," 408 U.S. at 667 (emphasis added), not whether it abridged the common law. Later emphasizing the same point, the majority stated, "Petitioners Branzburg and Pappas and respondent Caldwell press *First Amendment claims*." *Id.* at 679 (emphasis added); *see also* sep. op. at 3-4 (Henderson, J., concurring). Indeed, having examined the briefs and lower court opinions, I see no evidence that the parties ever even argued for a separate common law privilege. To be sure, the majority declared that "the great weight of authority is that newsmen are not exempt from the

normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation," *id.* at 685, but that point served only to reinforce the majority's constitutional holding.

Nor does *Branzburg* support the concurrence's constitutional avoidance theory. *See* sep. op. at 2 (Sentelle, J., concurring). Although the *Branzburg* majority could have avoided the First Amendment claim by recognizing a common law privilege, given that the majority opinion neither did so nor even raised that possibility, *Branzburg*'s holding hardly forecloses the common law argument presented here. Quite the contrary, *Branzburg* acknowledged that "Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned," 408 U.S. at 706, a power Congress delegated to the federal courts through Rule 501. Thus, if anything, the view that *Branzburg* disposed of the common law privilege gets it backwards. Insofar as *Branzburg* relied on the "great weight of authority" to discern the First Amendment's meaning, *see id.* at 686, the shift in favor of the privilege since that time—from seventeen states with statutory privileges then to thirty-one plus D.C. today, with another eighteen providing common law protection—could provide a basis for rethinking *Branzburg*. *Cf. Atkins v. Virginia*, 536 U.S. 304, 306-07 (2002) (overturning prior understanding of Eighth Amendment "cruel and unusual punishment" based on a "consensus" among "the American public, legislators, scholars, and judges" regarding execution of the mentally retarded). Although that is something only the Supreme Court can do, this point underscores the error in seeing *Branzburg* as dispositive.

Given that the common law issue thus remains open, this court must assess the reporters' claim in light of "reason and

experience" today. As *Branzburg* itself observes in describing Congress's powers, privilege rules may require "refashion[ing] . . . as experience from time to time may dictate." 408 U.S. at 706. Bestowing that refashioning power on the federal courts, Rule 501 evidences an "affirmative intention not to freeze the law of privilege," but rather "to leave the door open to change." *Trammel*, 445 U.S. at 47. Consistent with that intent, the Court in *Trammel* modified the privilege against adverse spousal testimony recognized just twenty-two years earlier in *Hawkins v. United States*, 358 U.S. 74 (1958), allowing the testifying spouse to waive the privilege, *see Trammel*, 445 U.S. at 53, even though *Hawkins* had held just the opposite, *see Hawkins*, 358 U.S. at 77-78. Had the Supreme Court addressed a common law claim in *Branzburg*, lower courts might lack authority to reconsider that case's result notwithstanding the subsequent growth in support for the privilege. *But cf. Trammel*, 445 U.S. at 43 (affirming court of appeals decision limiting Hawkins). Absent such a definitive ruling, however, and despite *Branzburg*'s observation about the "great weight of authority" thirty-three years ago, *see* 408 U.S. at 686, we must approach the issue with the same open-mindedness demonstrated by *Trammel*.

For much the same reason, the omission of a reporter privilege from the Judicial Conference Advisory Committee's draft rules submitted to Congress in 1972 (and ultimately replaced by Rule 501) need not dictate the outcome here. True, as the special counsel points out, the Supreme Court in *United States v. Gillock*, 445 U.S. 360, 367-68 (1980), declined to recognize a privilege not appearing in the Advisory Committee draft. As that decision acknowledges, however, the draft rules merely reflected what was "thought to be . . . indelibly ensconced in our common law" at the time. *See id.* Accordingly, when the *Jaffee* Court considered whether the psychotherapist privilege extended to social workers, it relied not on the 1972 draft, which covered

only licensed psychotherapists, but rather on the reasons for the privilege and the state laws in effect when *Jaffee* was decided. *See Jaffee*, 518 U.S. at 15-17 & n.16. Likewise, here, the dramatic growth in support for the reporter privilege supercedes the Advisory Committee's decades-old choice to omit the privilege from its draft.

Equally inconsequential is the adoption of the reporter privilege in thirty-one states through legislation, rather than judicial action. *See* sep. op. at 5 (Sentelle, J., concurring). As the *Jaffee* dissent pointed out, a far greater proportion of states—indeed, every state—established the psychotherapist privilege by statute, *see Jaffee*, 518 U.S. at 25-26 (Scalia, J., dissenting), yet the majority considered that fact "of no consequence," *id.* at 13-14. Nor does it matter that unconventional forms of journalism—freelance writers and internet "bloggers," for example—may raise definitional conundrums down the road. *See* sep. op. at 5-9 (Sentelle, J., concurring); *but see* Eugene Volokh, Opinion, *You Can Blog, But You Can't Hide*, N.Y. Times, Dec. 2, 2004, at A39 ("[T]he rules should be the same for old media and new, professional and amateur. Any journalist's privilege should extend to every journalist."). As *Jaffee* makes clear, "[a] rule," such as Rule 501, "that authorizes the recognition of new privileges on a case-by-case basis makes it appropriate to define the details of new privileges in a like manner." 518 U.S. at 18. After all, "flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law." *Hurtado v. California*, 110 U.S. 516, 530 (1884). Here, whereas any meaningful reporter privilege must undoubtedly encompass appellants Cooper and Miller, full-time journalists for *Time* magazine and the *New York Times*, respectively, future opinions can elaborate more refined contours of the privilege—a task shown to be manageable by the experience of the fifty jurisdictions with statutory or common law protections.

In sum, "reason and experience," as evidenced by the laws of forty-nine states and the District of Columbia, as well as federal courts and the federal government, support recognition of a privilege for reporters' confidential sources. To disregard this modern consensus in favor of decades-old views, as the special counsel urges, would not only imperil vital newsgathering, but also shirk the common law function assigned by Rule 501 and "freeze the law of privilege" contrary to Congress's wishes, *see Trammel*, 445 U.S. at 47.

Scope of the Privilege

The next step, according to *Jaffee*, is to determine what principles govern the privilege's application in this case. *See Jaffee*, 518 U.S. at 15-16 (deciding first that a psychotherapist privilege exists and only then addressing whether the privilege applies to social workers). Pointing out that many jurisdictions recognize only qualified protection for reporters, the special counsel argues that the uniform judgment of states must support application of the privilege in the precise context at issue—defiance of grand jury subpoenas—before federal courts may recognize it. That view, however, belonged to the *Jaffee* dissent, not the seven-justice majority. Although the dissenters noted an "enormous degree of disagreement among the States as to the scope of the privilege," 518 U.S. at 33 (Scalia, J., dissenting), particularly as to which professions it covered, *see id.* at 27 (Scalia, J., dissenting), the Court extended the privilege to licensed social workers because "[t]he reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker," *id.* at 16-17. Likewise, *Jaffee* rejected a proposed balancing test not because other jurisdictions had done so, but because "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would

eviscerate the effectiveness of the privilege." *See id.* at 17-18.

Here, even assuming that some jurisdictions categorically exclude grand jury subpoenas—a proposition for which the special counsel cites no authority—the interests protected by the privilege militate against such a limited approach. Although the public interest in law enforcement may well be at its apex when the government is investigating crime, news stories of paramount First Amendment importance, such as reports about government corruption or wrongdoing, may involve sources who "would surely be chilled," *Jaffee*, 518 U.S. at 12, if they thought grand juries could discover their identities from reporters in whom they confide. Furthermore, the special counsel's proposal is quite anomalous, considering that neither the attorney-client, nor the spousal, nor even the psychotherapist privilege gives way to the grand jury's truth-seeking function. *See, e.g.*, *Swidler & Berlin*, 524 U.S. at 403 (attorney-client); *Blau v. United States*, 340 U.S. 332, 333 (1951) (spousal); *In re Grand Jury Proceedings (Gregory P. Violette)*, 183 F.3d 71, 72 (1st Cir. 1999) (allowing grand jury testimony not because no psychotherapist privilege exists in that context, but rather because a "crime-fraud exception" applies to the privilege).

As to the scope of the privilege, however, I agree with the special counsel that protection for source identities cannot be absolute. Leaks similar to the crime suspected here (exposure of a covert agent) apparently caused the deaths of several CIA operatives in the late 1970s and early 1980s, including the agency's Athens station chief. *See Haig v. Agee*, 453 U.S. 280, 284-85 & n.7 (1981). Other leaks—the design for a top secret nuclear weapon, for example, or plans for an imminent military strike—could be even more damaging, causing harm far in excess of their news value. In such cases, the reporter privilege must give way. Just as attorney-client communications "made for the purpose of

getting advice for the commission of a fraud or crime" serve no public interest and receive no privilege, *see United States v. Zolin*, 491 U.S. 554, 563 (1989) (internal quotation marks omitted), neither should courts protect sources whose leaks harm national security while providing minimal benefit to public debate.

Of course, in some cases a leak's value may far exceed its harm, thus calling into question the law enforcement rationale for disrupting reporter-source relationships. For example, assuming Miller's prize-winning Osama bin Laden series caused no significant harm, I find it difficult to see how one could justify compelling her to disclose her sources, given the obvious benefit of alerting the public to then-underappreciated threats from al Qaeda. News reports about a recent budget controversy regarding a super-secret satellite program inspire another example (though I know nothing about the dispute's details and express no view as to its merits). *See, e.g.*, Dan Eggen & Walter Pincus, *Justice Reviews Request for Probe of Satellite Reports*, Wash. Post, Dec. 16, 2004, at A3; Douglas Jehl, *New Spy Plan Said to Involve Satellite System*, N.Y. Times, Dec. 12, 2004, at A1. Despite the necessary secrecy of intelligence-gathering methods, it seems hard to imagine how the harm in leaking generic descriptions of such a program could outweigh the benefit of informing the public about billions of dollars wasted on technology considered duplicative and unnecessary by leading Senators from both parties. In contrast to the nuclear weapon and military strike examples mentioned above, cases like these appear to involve a balance of harm and news value that strongly favors protecting newsgathering methods.

Given these contrasting examples, much as our civil cases balance "the public interest in protecting the reporter's sources against the private interest in compelling disclosure," *Zerilli*, 656 F.2d at 712; *see also Carey*, 492 F.2d at 634-36,

so must the reporter privilege account for the varying interests at stake in different source relationships. In other words, to quote the Justice Department subpoena guidelines, "the approach in every case must be to strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice." 28 C.F.R. § 50.10(a).

Citing our reporter privilege cases—*Zerilli*, *Carey*, and *Ahn*—the special counsel urges us to rely on two factors deemed "central" in those decisions and emphasized in the Justice Department guidelines: first, the requesting party's need for the evidence, and second, that party's exhaustion of alternative sources. *See Zerilli*, 656 F.2d at 712-14; *Ahn*, 231 F.3d at 37; *Carey*, 492 F.2d at 636-37, 638; 28 C.F.R. § 50.10(b), (f)(1). While both these considerations are obviously essential to minimizing the burden on newsgathering, they can serve as exclusive measures in the privilege analysis only where there exist means of proof other than compelling the reporter's testimony. When prosecuting crimes other than leaks (murder or embezzlement, say) the government, at least theoretically, can learn what reporters know by replicating their investigative efforts, *e.g.*, speaking to the same witnesses and examining the same documents. Accordingly, if a truly exhaustive investigation has failed to prove a crime that the government reasonably believes has occurred, compelled disclosure of a reporter's source may be justified notwithstanding the attendant burdens on newsgathering. As the special counsel acknowledged at oral argument, however, when the government seeks to punish a leak, a test focused on need and exhaustion will almost always be satisfied, leaving the reporter's source unprotected regardless of the information's importance to the public. The reason for this is obvious: Insofar as the confidential exchange of information leaves neither paper trail nor smoking gun, the great majority

of leaks will likely be unprovable without evidence from either leaker or leakee. Of course, in some cases, circumstantial evidence such as telephone records may point towards the source, but for the party with the burden of proof, particularly the government in a criminal case, such evidence will often be inadequate.

In leak cases, then, courts applying the privilege must consider not only the government's need for the information and exhaustion of alternative sources, but also the two competing public interests lying at the heart of the balancing test. Specifically, the court must weigh the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value. That framework allows authorities seeking to punish a leak to access key evidence when the leaked information does more harm than good, such as in the nuclear weapon and military strike examples, while preventing discovery when no public interest supports it, as would appear to be the case with Miller's Osama bin Laden articles. Though flexible, these standards (contrary to the special counsel's claim) are hardly unmanageable. Indeed, the Supreme Court employs a similar requirement of "legitimate news interest," meaning "value and concern to the public at the time of publication," in assessing restrictions on government employee speech. *See City of San Diego v. Roe*, __ U.S. __, 125 S. Ct. 521, 526 (2004) (per curiam). Nor is this analysis "novel," *see* sep. op. at 3 (Henderson, J., concurring), considering its basis in *Zerilli* and *Carey* and the Justice Department's own guidelines.

Though recognizing that leaks with "national security implications" raise different concerns from "information in the nature of 'whistleblowing,'" Appellee's Br. at 44, 48, the special counsel insists that the prosecutor, not the court, should assess factors other than need and exhaustion. Under

this theory, balancing the two remaining concerns, the harmfulness of the leaked information and the damage to newsgathering that might flow from enforcing the disputed subpoenas, would be a matter of prosecutorial discretion. In my view, the special counsel's position distorts the roles of judge and prosecutor in evidentiary disputes.

Although courts certainly defer to executive judgments about which crimes merit prosecution—a judgment that is, after all, a "core executive constitutional function," *United States v. Armstrong*, 517 U.S. 456, 465 (1996)—nonetheless the executive branch possesses no special expertise that would justify judicial deference to prosecutors' judgments about the relative magnitude of First Amendment interests. Assessing those interests traditionally falls within the competence of courts. *Cf. Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."). Indeed, while the criminality of a leak and the government's decision to press charges might well indicate the leak's harmfulness—a central concern of the balancing test—once prosecutors commit to pursuing a case they naturally seek all useful evidence. Consistent with that adversarial role, the Federal Rules of Evidence assign to courts the function of neutral arbiter: "Preliminary questions concerning the qualification of a person to be a witness, *the existence of a privilege*, or the admissibility of evidence shall be determined by the court." Fed. R. Evid. 104(a) (emphasis added). Accordingly, just as courts determine the admissibility of hearsay or the balance between probative value and unfair prejudice under Rule 403, so with respect to this issue must courts weigh factors bearing on the privilege.

Moreover, in addition to these principles applicable to the judicial role in any evidentiary dispute, the dynamics of leak inquiries afford a particularly compelling reason for

judicial scrutiny of prosecutorial judgments regarding a leak's harm and news value. Because leak cases typically require the government to investigate itself, if leaks reveal mistakes that high-level officials would have preferred to keep secret, the administration may pursue the source with excessive zeal, regardless of the leaked information's public value. Of course, in this case a special counsel was appointed to exercise independent judgment. Yet independent prosecutors, too, may skew their assessments of the public interests implicated when a reporter is subpoenaed. After all, special prosecutors, immune to political control and lacking a docket of other cases, face pressure to justify their appointments by bagging their prey. *Cf. Morrison v. Olson*, 487 U.S. 654, 727-28 (1988) (Scalia, J., dissenting) (noting "the vast power and the immense discretion that are placed in the hands of a prosecutor with respect to the objects of his investigation" and observing that "the primary check against prosecutorial abuse is a political one"). To be clear: I do not impugn the motives of this special counsel. Indeed, as I conclude below, his pursuit of the reporters' testimony appears reasonable. Nevertheless, these considerations—the special counsel's political independence, his lack of a docket, and the concomitant risk of overzealousness—weigh against his claim to deference in balancing harm against news value.

Paralleling the special counsel's argument about executive discretion, my concurring colleague suggests that my approach pays insufficient deference to Congress. *See* sep. op. at 8 (Henderson, J., concurring). "*Branzburg*," she writes, "warns of the risk inherent in the judicial assessment of the importance of prosecuting particular crimes." *See id.* Although it is true that *Branzburg* cautioned against second-guessing the "legislative judgment . . . of what conduct is liable to criminal prosecution," 408 U.S. at 706, it did so in a passage rejecting a test of governmental need that apparently "distinguish[ed] between the value of enforcing different criminal laws," deeming some statutes "compelling" and

others unimportant. *See id.* at 702, 705-06. The approach I propose entails no such judgment about the value of the statute under which the government is proceeding. Rather, my approach focuses on whether evidence the government believes it needs, *i.e.*, a reporter's testimony about a particular source, is privileged. To be sure, insofar as the reporter's testimony is critical in a particular case, privileging the evidence may render that case unprovable. But that risk accompanies any privilege or indeed any rule of evidentiary exclusion. Had Congress believed that judicial decisions excluding evidence interfered with its "legislative judgment" regarding underlying crimes, it would hardly have authorized recognition of common law privileges by enacting Rule 501.

Furthermore, and perhaps even more important, *Branzburg* addressed only a First Amendment privilege claim. *See supra* at 14. In that case, therefore, because Congress cannot overturn constitutionally based decisions, recognizing the asserted privilege would have permanently foreclosed punishment of any crimes dependent on proof subject to the privilege. The qualified privilege I would recognize, however, rests on Rule 501, not the Constitution. If Congress believes that this approach overrides its judgment about what conduct should be criminal, it may simply overturn the privilege and authorize use of the evidence.

Next, the special counsel argues that waivers signed by suspected sources represent an "additional factor" favoring compulsion of the reporters' testimony. Appellee's Br. at 46. As the reporters point out, however, numerous cases (including persuasive district court decisions from this circuit) indicate that only reporters, not sources, may waive the privilege. *See, e.g.*, *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980); *Palandjian v. Pahlavi*, 103 F.R.D. 410, 413 (D.D.C. 1984); *Anderson v. Nixon*, 444 F. Supp. 1195, 1198-99 (D.D.C. 1978). For the contrary proposition, the special counsel cites *McKevitt v. Pallasch*,

339 F.3d 530 (7th Cir. 2003), but that case involved a criminal defendant's effort to obtain non-confidential records from the biographers of a government witness, not waiver of confidentiality by a previously unidentified source. *See id.* at 531, 533-34. Nor does *Hutira v. Islamic Republic of Iran*, 211 F. Supp. 2d 115 (D.D.C. 2002), help the special counsel. While that decision indicated that "'the absence of confidentiality may be considered in the balance of competing interests as a factor that diminishes the journalist's, and the public's, interest in nondisclosure,'" *id.* at 120 (quoting *Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993)), it quashed the subpoena at issue, reasoning that "the privilege for journalists shields both confidential and nonconfidential information from compelled disclosure," *id.*

As this case law recognizes, a source's waiver is irrelevant to the reasons for the privilege. Because the government could demand waivers—perhaps even before any leak occurs—as a condition of employment, a privilege subject to waiver may, again, amount to no privilege at all, even in those leak cases where protecting the confidential source is most compelling. Moreover, although the attorney-client and psychotherapist privileges are waivable by clients and patients, respectively, *see, e.g.*, *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) (attorney-client); *Jaffee*, 518 U.S. at 15 n.14 (psychotherapist), that is because those privileges exist to prevent disclosure of sensitive matters related to legal and psychological counseling, *see, e.g.*, *Swidler & Berlin*, 524 U.S. at 407-08; *Jaffee*, 518 U.S. at 10-11, a rationale that vanishes when the source authorizes disclosure. In contrast, the reporter privilege safeguards public dissemination of information—the reporter's enterprise, not the source's.

Consistent with that purpose, the privilege belongs to the reporter. Not only are journalists best able to judge the imperatives of newsgathering, but while the source's interest

is limited to the particular case, the reporter's interest aligns with the public, for journalists must cultivate relationships with other sources who might keep mum if waiving confidentiality at the government's behest could lead to their exposure. Indeed, as compared to counseling-related privileges, the privilege against spousal testimony represents a better analogy. Just as under *Trammel*'s waiver theory testifying spouses, regardless of the other spouse's wishes, may judge for themselves whether their testimony will undermine "marital harmony," *see Trammel*, 445 U.S. at 44-45, 52-53, so should journalists—the experts in newsgathering—base the decision to testify on their own assessment of the consequences, unconstrained by their source's waiver (provided other requirements of the privilege are met).

For their part, appellants insist that a qualified privilege fails to provide the certainty their work requires because sources are unlikely to disclose information without an advance guarantee of secrecy. In particular, they argue that journalists cannot balance a leak's harm against its news value until they know what information the source will reveal, by which time it is too late to prevent disclosure. True enough, but journalists are not the ones who must perform the balancing; sources are. Indeed, the point of the qualified privilege is to create disincentives for the source—disincentives that not only promote the public interest, but may also protect journalists from exploitation by government officials seeking publication of damaging secrets for partisan advantage. Like other recipients of potentially privileged communications—say, attorneys or psychotherapists—the reporter can at most alert the source to the limits of confidentiality, leaving the judgment of what to say to the source. While the resulting deterrent effect may cost the press some leads, little harm will result, for if the disincentives work as they should, the information sources

refrain from revealing will lack significant news value in the first place.

In any event, although *Jaffee* said that "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation . . . [will] eviscerate the effectiveness of the privilege," 518 U.S. at 17, the clash of fundamental interests at stake when the government seeks discovery of a reporter's sources precludes a categorical approach. *See Zerilli*, 656 F.2d at 712 n.46 (rejecting arguments for greater "specificity" as to the scope of the First Amendment privilege in civil litigation). And as we explained in *Zerilli*, the "deterrence effect" on beneficial newsgathering will be small if courts make clear that the privilege is "overridden only in rare circumstances." *See id.* at 712 & n.46.

In short, the question in this case is whether Miller's and Cooper's sources released information more harmful than newsworthy. If so, then the public interest in punishing the wrongdoers—and deterring future leaks—outweighs any burden on newsgathering, and no privilege covers the communication (provided, of course, that the special counsel demonstrates necessity and exhaustion of alternative evidentiary sources).

III.

Applying this standard to the facts of this case, and considering first only the public record, I have no doubt that the leak at issue was a serious matter. Authorized "to investigate and prosecute violations of any federal criminal laws related to the underlying alleged unauthorized disclosure, as well as federal crimes committed in the course of, and with intent to interfere with, [his] investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses," *see* Letter from James B. Comey, Acting Attorney General, to Patrick J. Fitzgerald, United States Attorney, Northern District of Illinois (Feb. 6, 2004), the special counsel is attempting to discover the origins of

press reports describing Valerie Plame as a CIA operative monitoring weapons of mass destruction. *See* majority op at 3-5. These reports appeared after Plame's husband, former Ambassador Joseph Wilson, wrote in a *New York Times* op-ed column that his findings on an official mission to Niger in 2002 cast doubt on President Bush's assertion in his January 2003 State of the Union address that Iraq "recently sought significant quantities of uranium from Africa." *See id.* at 3.

An alleged covert agent, Plame evidently traveled overseas on clandestine missions beginning nearly two decades ago. *See, e.g.*, Richard Leiby & Dana Priest, *The Spy Next Door; Valerie Wilson, Ideal Mom, Was Also the Ideal Cover*, Wash. Post, Oct. 8, 2003, at A1. Her exposure, therefore, not only may have jeopardized any covert activities of her own, but also may have endangered friends and associates from whom she might have gathered information in the past. Acting to criminalize such exposure of secret agents, *see* 50 U.S.C. § 421, Congress has identified that behavior's "intolerable" consequences: "[t]he loss of vital human intelligence which our policymakers need, the great cost to the American taxpayer of replacing intelligence resources lost due to such disclosures, and the greatly increased risk of harm which continuing disclosures force intelligence officers and sources to endure." S. Rep. No. 97-201, at 10-11 (1981), *reprinted in* 1982 U.S.C.C.A.N. 145, 154-55.

The leak of Plame's apparent employment, moreover, had marginal news value. To be sure, insofar as Plame's CIA relationship may have helped explain her husband's selection for the Niger trip, that information could bear on her husband's credibility and thus contribute to public debate over the president's "sixteen words." Compared to the damage of undermining covert intelligence-gathering, however, this slight news value cannot, in my view, justify privileging the leaker's identity.

Turning now to the classified material, I agree with the special counsel that ex parte review presents no due process difficulty. To be sure, grand jury secrecy is not absolute. As Rule 6(e) itself provides, courts may "authorize disclosure ... of a grand jury matter ... preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(E). In addition, as the reporters point out, even apart from *United States v. Dinsio*, 468 F.2d 1392 (9th Cir. 1973), now superceded by *United States v. Mara*, 410 U.S. 19 (1973), *see* majority op at 19 (citing *In re Braughton*, 520 F.2d 765, 767 (9th Cir. 1975)), the Second and Ninth Circuits have held that due process requires an "uninhibited adversary hearing" in civil contempt proceedings, *see United States v. Alter*, 482 F.2d 1016, 1024 (9th Cir. 1973) (internal quotation marks omitted); *In the Matter of Kitchen*, 706 F.2d 1266, 1272 (2d Cir. 1983) (internal quotation marks omitted), including "the right to confront all the government's evidence, both documentary and testimonial, unless particular and compelling reasons peculiar to the grand jury function require some curtailment of [that] right," *Kitchen*, 706 F.2d at 1272.

In this circuit, however, we have approved the use of "*in camera, ex parte* proceedings to determine the propriety of a grand jury subpoena or the existence of a crime-fraud exception to the attorney-client privilege when such proceedings are necessary to ensure the secrecy of ongoing grand jury proceedings." *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1075 (D.C. Cir. 1998) (per curiam). Just as due process poses no barrier to forcing an attorney to testify based on the court's examination of evidence, unseen by the lawyer, that the client sought legal advice in pursuit of a crime, neither does it preclude compulsion of a reporter's testimony based on a comparable review of evidence, likewise unseen by the reporter, that a source engaged in a harmful leak. In fact, appellants' protests notwithstanding, ex parte review protects their interests, as it allows the

government to present—and the court to demand—a far more extensive showing than would otherwise be possible given the need for grand jury secrecy discussed in the court's opinion, *see* majority op at 17-18.

That said, without benefit of the adversarial process, we must take care to ensure that the special counsel has met his burden of demonstrating that the information is both critical and unobtainable from any other source. Having carefully scrutinized his voluminous classified filings, I believe that he has.

With respect to Miller, * * * * * [REDACTED] * * * * *

Regarding Cooper, * * * * * [REDACTED] * * * * *

In sum, based on an exhaustive investigation, the special counsel has established the need for Miller's and Cooper's testimony. Thus, considering the gravity of the suspected crime and the low value of the leaked information, no privilege bars the subpoenas.

One last point. In concluding that no privilege applies in this case, I have assigned no importance to the fact that neither Cooper nor Miller, perhaps recognizing the irresponsible (and quite possibly illegal) nature of the leaks at issue, revealed Plame's employment, though Cooper wrote about it after Novak's column appeared. Contrary to the reporters' view, this apparent self-restraint spares Miller and Cooper no obligation to testify. Narrowly drawn limitations on the public's right to evidence, testimonial privileges apply "only where necessary to achieve [their] purpose," *Fisher v. United States*, 425 U.S. 391, 403 (1976), and in this case the privilege's purpose is to promote dissemination of useful information. It thus makes no difference how these reporters responded to the information they received, any more than it matters whether an attorney drops a client who seeks criminal advice (communication subject to the crime-fraud exception) or a psychotherapist seeks to dissuade homicidal plans revealed during counseling (information *Jaffee* suggested would not be privileged, *see* 518 U.S. at 18 n.19). In all such cases, because the communication is unworthy of protection, recipients' reactions are irrelevant to whether their testimony may be compelled in an investigation of the source.

Indeed, Cooper's own *Time*.com article illustrates this point. True, his story revealed a suspicious confluence of leaks, contributing to the outcry that led to this investigation. Yet the article had that effect precisely because the leaked information—Plame's covert status—lacked significant news value. In essence, seeking protection for sources whose nefariousness he himself exposed, Cooper asks us to protect

criminal leaks so that he can write *about* the crime. The greater public interest lies in preventing the leak to begin with. Had Cooper based his report on leaks about the leaks—say, from a whistleblower who revealed the plot against Wilson—the situation would be different. Because in that case the source would not have revealed the name of a covert agent, but instead revealed the fact that others had done so, the balance of news value and harm would shift in favor of protecting the whistleblower. Yet it appears Cooper relied on the Plame leaks themselves, drawing the inference of sinister motive on his own. Accordingly, his story itself makes the case for punishing the leakers. While requiring Cooper to testify may discourage future leaks, discouraging leaks of this kind is precisely what the public interest requires.

IV.

I conclude, as I began, with the tensions at work in this case. Here, two reporters and a news magazine, informants to the public, seek to keep a grand jury uninformed. Representing two equally fundamental principles—rule of law and free speech—the special counsel and the reporters both aim to facilitate fully informed and accurate decision-making by those they serve: the grand jury and the electorate. To this court falls the task of balancing the two sides' concerns.

As James Madison explained, "[A] people who mean to be their own Governors must arm themselves with the power which knowledge gives." *See In re Lindsey*, 148 F.3d 1100, 1109 (D.C. Cir. 1998) (quoting Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 The Writings of James Madison 103 (Gaillard Hunt ed., 1910)). Consistent with that maxim, "[a] free press is indispensable to the workings of our democratic society," *Associated Press v. United States*, 326 U.S. 1, 28 (1945) (Frankfurter, J., concurring), and because confidential sources are essential to the

workings of the press—a practical reality that virtually all states and the federal government now acknowledge—I believe that "reason and experience" compel recognition of a privilege for reporters' sources. That said, because "[l]iberty can only be exercised in a system of law which safeguards order," *Cox v. Louisiana*, 379 U.S. 559, 574 (1965), the privilege must give way to imperatives of law enforcement in exceptional cases.

Were the leak at issue in this case less harmful to national security or more vital to public debate, or had the special counsel failed to demonstrate the grand jury's need for the reporters' evidence, I might have supported the motion to quash. Because identifying appellants' sources instead appears essential to remedying a serious breach of public trust, I join in affirming the district court's orders compelling their testimony.

APPENDIX B

United States District Court,

District of Columbia.

In re: SPECIAL COUNSEL INVESTIGATION

Nos. MISC.04-296(TFH), MISC.04-297(TFH).

July 20, 2004.

MEMORANDUM OPINION

THOMAS F. HOGAN, Chief Judge.

Pending before the Court are two motions to quash subpoenas filed by journalists, Matthew Cooper and Tim Russert. The subpoenas were issued by Special Counsel Patrick Fitzgerald as part of the ongoing investigation into the potentially illegal disclosure of the identity of CIA official Valerie Plame. Specifically, *Time* magazine reporter Matthew Cooper and NBC Washington Bureau Chief Tim Russert were asked to appear before the grand jury to testify regarding alleged conversations they had with a specified Executive Branch official. Because this Court holds that the U.S. Supreme Court unequivocally rejected any reporter's privilege rooted in the First Amendment or common law in the context of a grand jury acting in good faith, this Court denies the motions to quash.

Background

On July 6, 2003, the *New York Times* published former Ambassador Joseph Wilson's column "What I Didn't Find in Africa," in which he charged that President Bush had "twisted" intelligence related to Iraq's nuclear program in his 2003 State of the Union Address. After the article was published, Ambassador Wilson's article and other statements he made to members of the media were extensively reported on by a number of news outlets. Motion of Non-Party Tim Russert to Quash Grand Jury Subpoena ("Russert Mot.") at 2-3.

On July 14, 2003, the *Washington Post* and other newspapers published a column written by Robert Novak in which he identified Ambassador Wilson's wife, Valerie Plame, as a CIA Officer. Specifically, the article reported that Ambassador Wilson's "wife, Valerie Plame, is an agency operative on weapons of mass destruction. Two senior administration officials told me his wife suggested sending Wilson to Niger." Russert Mot. at 3. Two months after that article was published, the *Post* reported that "two top White House officials called at least six Washington journalists and disclosed the identity and occupation of Wilson's wife." *Id.*

In December 2003, the Department of Justice appointed United States Attorney Patrick Fitzgerald as Special Counsel to investigate the allegations that one or more Executive Branch officials unlawfully disclosed the name of a purported covert CIA operative, Valerie Plame. Russert Mot. at 3. On May 21, 2004, grand jury subpoenas were issued to Mr. Cooper and Mr. Russert. Subsequent discussions between each reporter's respective attorneys and Special Counsel revealed that Mr. Fitzgerald intended to question each journalist about alleged discussions they had with a specified Executive Branch official. The specific subject matter Special Counsel will address before the grand jury is quite circumscribed, but it does delve into alleged conversations each

reporter had with a confidential source. Russert Mot. at 4; Motion of Matthew Cooper to Quash Subpoena and/or for Protective Order ("Cooper Mot.") at 6-7.

Mr. Cooper and Mr. Russert base their motions to quash the grand jury subpoenas on the grounds that they violate the reporters privilege embodied in the First Amendment and common law. They also point to the D.C. Shield Law, D.C. Code Ann. §§ 16-4702(1), 4703(b) (2001) and the Department of Justice's own policy statements regarding the issuance of subpoenas to members of the press, 26 C.F.R. § 50.10, as further support that the subpoenas should be quashed. In addition to the papers submitted in opposition to the motions to quash, Mr. Fitzgerald submitted an *ex parte* affidavit filed under seal. Government's Response to Motion to Quash Grand Jury Subpoena [re: Cooper] ("Gov't Opp'n to Cooper") at 1.

Analysis

This Court need not search far to find a case which directly addresses the issues currently before it. In *Branzburg v. Hayes,* the United States Supreme Court squarely addressed the application of a reporters privilege in the context of a grand jury. *Branzburg v. Hayes*, 408 U.S. 665 (1972). In that case, the Supreme Court consolidated into one opinion four cases involving journalists who were subpoenaed before grand juries and asked to testify about, *inter alia,* the identity of informants and information they had been told in confidence. The reporters objected to the subpoenas based on their rights under the First Amendment. *Id.* at 672.

In the Court's opinion, Justice White explained that any incidental burden that testifying before a grand jury may have on the journalists was far outweighed by society's interest is law enforcement. *Branzburg,* 408 U.S. at 690-91. The Court acknowledged the vital, constitutionally mandated role that grand juries have in the government's fundamental function of ensuring "[f]air and effective law enforcement aimed

at providing security for the person and property of the individual." *Id.* It is the responsibility of every citizen to appear before a grand jury in order to assist that body with its essential tasks. *Id.* at 682.

The *Branzburg* Court held that the First Amendment concerns should not alter news-gatherers' obligations to testify before grand juries because asking members of the press to appear before the grand juries "involve[s] no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold." *Id.* at 681. The journalists were not being forbidden from continuing to use confidential sources, nor were they being asked to indiscriminately disclose the identity of their sources upon request. *Id.* at 681-82. The Court acknowledged that the reporters' argument that the dissemination of news to the public would be diminished by forcing members of the press to testify before grand juries was a rational concern. This fear, however, did not carry much weight with the Court which found that evidence of such an inhibiting effect of grand jury subpoenas was "widely divergent and to a great extent speculative." *Id.* at 693-94. "We cannot accept the argument that the public interest in possible future news about crime . . . . must take precedence over the public interest in pursuing and prosecuting those crimes." *Id.* at 695. The *Branzburg* Court held that there is no First Amendment privilege exempting members of the press from appearing before grand juries upon issuance of a valid subpoena. Furthermore, common law provides no such reporters privilege. *Id.* at 685 ("At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury."). In the absence of a grand jury acting in bad faith or with the sole purpose of harassment, *Branzburg* makes clear that neither the First Amendment nor common law protect reporters from

their obligations shared by all citizens to testify before the grand jury when called to do so.

Rather than agreeing that no reporters privilege exists in the grand jury context, Petitioners assert that *Branzburg* actually stands for the proposition that reporters enjoy a qualified privilege under the First Amendment and courts should employ a balancing test when faced with a reporter subpoenaed before a grand jury. Cooper Mot. at 8-10; Russert Mot. at 7-8. This argument fails for many reasons The *Branzburg* Court explicitly rejected the idea that a qualified privilege exists in the grand jury context when that grand jury is acting in good faith. *Branzburg v. Hayes*, 408 U.S. 665, 703 (1972). Justice White explained that a qualified privilege would not be feasible because it would present practical and conceptual difficulties for courts such as requiring them to define the categories of journalists who qualified for the privilege – an extremely difficult task under the Court's First Amendment jurisprudence. *Id.* at 703-04. Courts would be forced to answer questions that would embroil them in preliminarily determinations such as whether there is probable cause to believe a crime has been committed, whether there is a sufficient likelihood that the journalist has useful information, and most suspect, whether protecting society against a specific type of criminal activity is more important than protecting a reporter's rights. *Id.* at 705-06. The Court refused to require courts to become involved in such an analysis, and therefore, expressly refused to find that the press has any qualified privilege against testifying before a grand jury.

Petitioners rest their claim that *Branzburg* stands for a qualified privilege for reporters on the assumption that the holding of in the case is controlled by Justice Powell who joined the majority opinion, but issued a separate concurrence. Cooper argues that in a 5-4 majority where a member of the majority writes a separate concurring opinion as is the case in *Branzburg*, the concurring opinion "represents the

holding of the Court on the rationale that the majority opinion is not a true majority except to the extent that it accords with the views of the concurrence." Cooper Mot. at 9 n.21. Movants further support this position by citing to various courts who have quoted Powell's concurring opinion when referencing the holding of the Branzburg Court. *See, e.g. Zerilli v. Smith,* 656 F.2d 705 (D.C. Cir. 1981). This Court disagrees with that position. As Special Counsel points out "Justice Powell's concurring opinion is not a separate opinion concurring only in the judgement. Justice Powell was one of five Justices joining Justice White's opinion for the court, so Justice White's opinion is a majority opinion and not a plurality opinion." Gov't Opp'n to Cooper at 8 n.1. More importantly, it is the view of this Court that Powell's concurrence is entirely consistent with the holding of the majority in *Branzburg.*

In his concurrence, Justice Powell elaborates on the Court's statement that grand juries brought in bad faith may not harass members of the press. He clarifies that if the reporter has any reason to believe that "his testimony implicates confidential source relationship without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." *Branzburg,* 408 U.S. at 710 (Powell, J., concurring). This Court holds that the balancing test Justice Powell refers to should only be undertaken when a reporter is asked to testify before a grand jury "without a legitimate need of law enforcement." *Id.* "The balancing of interests suggested by Justice Powell is in the limited circumstances he mentioned, where there is, in effect, an abuse of the grand jury function. If Justice Powell's concurrence is read more broadly, it would be inconsistent with Justice White's opinion with which he concurred."

In re Grand Jury Proceedings, 5 F.3d 397, 401 (9th Cir. 1993). This reading is further supported by the fact that Justice Powell explicitly rejects the qualified privilege advocated by the dissent. *Branzburg,* at 710 n.*. Although Justice Powell does refer to the necessity of a proper balance of the societal interests involved, "it is clear that he is actually referring to the availability of judicial case-by-case screening out for Bad faith 'improper and prejudicial' interrogation. Indeed this court has already so interpreted Justice Powell's opinion in *In re Possible Violations of 371, 641, 1503,* 184 U.S.App.D.C. 82, 564 F.2d 567 (1977)." *Reporters Comm. for Freedom of Press v. American Telephone & Telegraph Co.,* 593 F.2d 1030, 1061 n.107 (D.C. Cir. 1978); *see also In re Grand Jury Proceedings,* 810 F.2d 580, 585 (6th Cir. 1987) ("Justice Powell's concurring opinion is entirely consistent with the majority opinion, and neither limits nor expands upon its holding, but that, instead, it responds to what Justice Powell perceived as an unwarranted characterization of that holding by Justice Stewart."); *In re Grand Jury 95-1,* 59 F. Supp. 2d 1, 14 (D.D.C. 1996) ("[T]his Court finds that Justice Powell's concurring opinion is consistent with Justice White's majority opinion in *Branzburg.* Both opinions found that no testimonial privilege exists for newsmen which does not exist for other citizens.")

Only two federal circuits courts have directly addressed the issue of a reporter's privilege in the grand jury context, and both of those courts held that there was no privilege. *See In re Grand Jury Proceedings, Storer Communications, Inc.,* 810 F.2d 580 (6th Cir. 1987); *Lewis v. United States,* 517 F.2d 236 (9th Cir. 1975). One district court held that there is a common law qualified newsman's privilege in the grand jury context. *In re Grand Jury Subpoena of Williams,* 766 F. Supp. 358 (W.D.Pa. 1991) *aff'd* 963 F.2d 567 (3rd Cir. 1992)

(en banc) (dispositive order without discussion of merits).[1] This Court declines to follow that case "on the ground that it directly conflicts with the Supreme Court's holding in *Branzburg.*" *In re Grand Jury Proceedings,* 5 F.3d 397, 403 (9th Cir. 1993). Other circuits have demonstrated adherence to *Branzburg* 's assertion that there is no reporter's privilege except in the face of a grand jury acting in bad faith. *See In re Grand Jury Proceedings,* 5 F.3d 397, 401-03 (9th Cir. 1993) (court denied motion to quash a subpoena served on a "scholar" based on the reasoning of *Branzburg* holding there is no privilege in the absence of bad faith); *In re Grand Jury 87-3 Subpoena Duces Tecum,* 955 F.2d 229, 232-34 (4th Cir. 1992) (subpoena seeking corporate records upheld after applying *Branzburg* standard); *United States v. Smith,* 135 F.3d 963, 968-70 (5th Cir. 1998) (reporters subpoenaed and not protected from the subpoena based on *Branzburg* analysis).

The Circuit Court for the District of Columbia has upheld the holding of *Branzburg. Reporters Comm. for Freedom of Press v. American Telephone & Telegraph Co.,* 593 F.2d 1030, 1061 (D.C. Cir. 1978) ("The Court in *Branzburg* determined that Good faith criminal investigation interests Always override a journalist's interest in preserving the secrecy of his sources."); *In re Possible Violations of 18*

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[1] The *Williams* court supported its holding by explaining that the adoption of Federal Rule of Evidence 501 required privileges to be governed by the principles of common law. It then applied a reporters privilege which the Third Circuit had created in a *civil* case to the grand jury context. 766 F. Supp. at 367-68. This Court finds that the application of a reporters privilege applicable in the civil context to a case involving a grand jury subpoena is flawed and directly inconsistent with the Supreme Court's holding in *Branzburg.*

U.S.C. 371, 641, 1503, 564 F.2d 567, 571 (D.C. Cir. 1977) (concluding that *Branzburg* established a "newsman can claim no general immunity, qualified or otherwise, from grand jury questioning. On the contrary, like all other witnesses, he must appear and normally must answer. If the grand jury's questions are put in bad faith or for the purpose of harassment, he can call on the courts for protection."). The D.C. District court has followed suit. *In re Grand Jury 95-1,* 59 F. Supp. 2d 1, 10-15 (D.D.C. 1996) (adopting *Branzburg* 's holding and analysis in rejecting journalist's motion to quash a grand jury subpoena).

It is true that some courts have chipped away at the holding of *Branzburg* by ruling that a court shall apply a qualified privilege in certain limited contexts. These courts have done so by carving out various factual scenarios different than those presented in *Branzburg* and announcing that a judge should apply a balancing test. *United States v. Ahn,* 231 F.3d 26 (D.C. Cir. 2000) (criminal case addressing "breach of contract" issue); *United States v. LaRouche Campaign,* 841 F.2d 1176 (1st Cir. 1988) (pre-trial criminal proceeding); *United States v. Burke,* 700 F.2d 70 (2d Cir. 1983) (criminal trial); *Zerilli v. Smith,* 656 F.2d 705 (D.C. Cir. 1981) (civil proceeding); *United States v. Hubbard,* 493 F. Supp. 202 (D.D.C. 1979) (criminal case); *Carey v. Hume,* 492 F.2d 631 (D.C. Cir. 1974) (civil proceeding); *Baker v. F & F Investment,* 470 F.2d 778 (2d Cir. 1972) (civil action). In all of those cases noted by the petitioner, there was no Supreme Court precedent for the factual situation they were faced with indicating how they must rule. This court does not share that luxury. Whatever extent lower courts around the country have eroded the periphery of the *Branzburg* opinion, the core of the opinion stands strong. The facts of this case fall entirely within that core – a reporter called to testify before a grand jury regarding confidential information enjoys no First Amendment protection. In the three decades since that opinion was penned, the Supreme Court has chosen not to issue a

ruling contradicting that holding. Therefore, neither shall this Court.

Petitioner Russert attempts one last time to steer the court away from the inevitable holding in Branzburg by arguing that the case did not deal with confidential sources and that other courts have identified confidential sources as unique situations. (Russert Tr. at 15-20.) Russert argues that the relevant distinction is not between grand juries and all other judicial proceedings. Rather, petitioner submits, the relevant distinction is between cases when the government seeks to question a journalist about a confidential source and "those cases – like *Branzburg* – in which a journalist, like any other citizen, is obliged to testify about criminal conduct that he observed." Reply Memorandum of Points and Authorities in Support of Non-Party Tim Russert's Motion to Quash Grand Jury Subpoena at 5. "This Court agrees with the Independent Counsel that the line should be drawn at the nature of the proceeding; not depending on how the reporter obtained the information at issue." *In re Grand Jury 95-1,* 59 F. Supp. 2d 1, 13 (D.D.C. 1996). Petitioner's interpretation of *Branzburg* is again inaccurate. Although some of the reporters in *Branzburg* did observe criminal conduct, one of the reporters did not observe any criminal conduct and was asked to testify about information he had learned from confidential sources. *Branzburg,* 408 U.S. at 672-73. More importantly, the entire *Branzburg* opinion is laced with references to confidential sources and Justice White makes clear that the "heart of the [reporters'] claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information." *Id.* at 681. The *Branzburg* opinion's holding that there is no First Amendment or common law reporters privilege in the grand jury context plainly encompasses journalists asked to reveal confidential sources and information.

Two other arguments proffered by the movants merit a response. First, movants point to the District of Columbia Shield Law, D.C. Code Ann. §§ 16-4702-4703 (2001), as a secondary basis for the Court to quash the journalists' subpoenas. The Court disagrees. The federal law of privilege exclusively governs evidentiary privileges in cases arising under federal substantive law in federal court. Fed.R.Evid. 501. "Whatever may be its force in the context of a civil common law action in a court of the District of Columbia .... the D.C. statute is inapplicable here. Congress has never enacted a federal counterpart to the D.C. Shield Law." *Lee v. United States Dep't of Justice,* 287 F. Supp. 2d 15, 17 (D.D.C. 2003). Second, Cooper and Russert assert that the subpoenas must be quashed because the Department of Justice Guidelines for issuing subpoenas to news media ("DOJ guidelines") were not met. 26 C.F.R. § 50.10. This Court is not convinced that the DOJ guidelines vest any right whatsoever in movants.[2] Assuming, *arguendo,* that the DOJ guidelines did vest a right in the movants in these cases, this Court holds that the DOJ guidelines are fully satisfied by the facts of this case as presented to the court in the *ex parte* affidavit of Patrick Fitzgerald. Furthermore, assuming *arguendo* that this Court were to determine that the journalists did possess a qualified privilege – a holding which this Court has explained is simply not supported by case law – the *ex parte*

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[2] See 28 C.F.R. § 50.10(n) ("The principles set forth in this section are not intended to create or recognize any legally enforceable right in any person."); *In re Grand Jury Subpoena Am. Broad. Cos., Inc.,* 947 F. Supp. 1314, 1322 (E.D. Ark. 1996) (denying television network's request to quash grand jury subpoena on the basis that DOJ guidelines were not fulfilled because DOJ "regulations, by their own terms, confer no enforceable right on the subpoenaed person.").

affidavit has also established that Special Counsel would be able to meet even the most stringent of balancing tests. The information requested from Mr. Cooper and Mr. Russert is very limited, all available alternative means of obtaining the information have been exhausted, the testimony sought is necessary for the completion of the investigation, and the testimony sought is expected to constitute direct evidence of innocence or guilt. To be clear, this Court holds that Cooper and Russert have no privilege, qualified or otherwise, excusing them from testifying before the grand jury in this matter. There have been no allegations whatsoever that this grand jury is acting in bad faith or with the purpose of harassing these two journalist. Therefore, under the holding in *Branzburg* and its progeny, Mr. Cooper and Mr. Russert must fulfill their obligation, shared by all citizens, to answer a valid subpoena issued to them by a grand jury acting in good faith. An appropriate order will accompany this opinion.

July 20, 2004

/s/

Thomas F. Hogan

Chief Judge

ORDER

Pending before the Court are "Motion of Matthew Cooper to Quash Subpoena and/or for Protective Order" and "Motion of Non-Party Tim Russert to Quash Grand Jury Subpoena." For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that both motions are **DENIED**.

SO ORDERED.

APPENDIX C

United States District Court,

District of Columbia.

In re: SPECIAL COUNSEL INVESTIGATION

Nos. MISC.04-296(TFH), 04-379(TFH).

Aug. 9, 2004.

ORDER

THOMAS F. HOGAN, District Judge.

Pending before the Court is the Motion of the UNITED STATES OF AMERICA, by PATRICK J. FITZGERALD, SPECIAL COUNSEL, to hold witnesses Matthew Cooper and TIME Inc. in civil contempt of court pursuant to 28 U.S.C. § 1826. After conducting a hearing on August 6, 2004 and being fully advised, this Court finds as follows:

1. Matthew Cooper, having received a subpoena for grand jury testimony and the production of certain documents, moved to quash the subpoena, and this Court denied the motion to quash for the reasons stated in its Memorandum Opinion dated July 20, 2004.

2. Matthew Cooper has, in person and through counsel, refused to comply with the grand jury subpoena without just cause.

3. Based on this refusal, Matthew Cooper is in civil contempt of this Court.

4. TIME Inc., having received a subpoena for grand jury testimony and the production of certain documents, moved to quash the subpoena, and this Court denied the motion to quash on August 6, 2004, for the reasons stated in its Memorandum Opinion dated July 20, 2004.

5. TIME Inc., through counsel, refused to comply with the grand jury subpoena without just cause.

6. Based on this refusal, TIME Inc. is in civil contempt of this Court.

7. Matthew Cooper and TIME Inc. have indicated their intention to pursue an appeal of this Court's order to United States Court of Appeals for the District of Columbia Circuit, and have agreed to file notices of appeal within two business days of the entry of this order. The parties have agreed to propose an expedited briefing schedule in the Court of Appeals requiring the filing of appellant's brief twelve days after the filing of notice of appeal, the filing of appellee's brief seven days after the filing of appellant's brief, and the filing of appellant's reply three days thereafter.

8. The appeals of Matthew Cooper and TIME Inc. are brought in good faith and present substantial legal questions.

Based on the foregoing findings of fact, and for the reasons stated in open court, it is hereby

ORDERED that:

1. Matthew Cooper is ordered confined at a suitable place until such time as he is willing to comply with the grand jury subpoena. The period of confinement shall not exceed the life of the term of the grand jury, including extensions, and in no event shall exceed eighteen months.

2. TIME Inc. is ordered to pay a fine of $1,000 per day until such time as it is willing to comply with the grand jury subpoena. The term of the fine shall not exceed the life of the term of the grand jury, including extensions, and in no event shall exceed eighteen months.

3. The order of confinement as to Matthew Cooper, and the fine ordered as to TIME Inc., are stayed, and Matthew Cooper is granted bail pending appeal of the court's finding of contempt to the United States Court of Appeals for the District of Columbia Circuit.

4. The following portions of the record will be unsealed: (a) Order and Memorandum Opinion dated July 20, 2004; (b) Response of Matthew Cooper to Motion of Government for Entry of Order to Show Cause; (c) Government's Memorandum Regarding Contempt Proceeding; and (d) transcript of the August 6, 2004 hearing.

5. All other submissions and court proceedings relating to the subject grand jury subpoenas and motions to quash will remain under seal until further order of the Court.

SO ORDERED.

August 9, 2004 /s/

The Honorable Thomas F. Hogan

United States District Judge

APPENDIX D

United States District Court,

District of Columbia.

In Re: SPECIAL COUNSEL INVESTIGATION

No. 04-407 (TFH).

Sept. 9, 2004.

Order unsealing Order & Memorandum Sept. 15, 2004.

MEMORANDUM OPINION

THOMAS F. HOGAN, Chief Judge.

Pending before the Court is Motion of Judith Miller to Quash Grand Jury Subpoenas and/or for Protective Order. The subpoenas were issued by Special Counsel Patrick Fitzgerald as part of the ongoing investigation into the potentially illegal disclosure of the identity of CIA official Valerie Plame. Ms. Miller is a journalist who was asked to appear before the grand jury to testify regarding alleged conversations she had with a specified Executive Branch official. For the reasons set forth in this Court's July 20, 2004 Memorandum Opinion in the cases Misc. Nos. 04-296 and 04-297, as well as the additional reasons stated below, the Court denies the motion to quash.

Background

The facts surrounding this case are outlined in the Court's Memorandum Opinion of July 20, 2004, and therefore the Court will only briefly address Ms. Miller's role in case. Judith Miller is an investigative reporter for *The New York Times*. Although Ms. Miller never wrote an article about Ambassador Joseph Wilson or his wife Valerie Plame, she contemplated writing one. In preparation, Ms. Miller spoke with one or more confidential sources regarding Ambassador Wilson's article, "What I Didn't Find in Africa." Affidavit of Judith Miller ¶¶ 1,5. The Office of Special Counsel Patrick Fitzgerald has served two subpoenas on Ms. Miller: one requesting her testimony before the grand jury regarding confidential conversations she had with a specified administration official and the other asking her to produce specific documents relating to those conversations. Government's Response to Motion to Quash Grand Jury Subpoenas ("Gov't Opp'n") at 3. As was the case with the subpoenas issued upon Mr. Cooper and Mr. Russert addressed in the Court's July 20, 2004 Opinion, the specific subject matter Special Counsel will address before the grand jury is quite circumscribed, but it does delve into alleged conversations each reporter had with a confidential source.

Ms. Miller objects to the subpoenas using the same legal arguments that were raised by Mr. Cooper and Mr. Russert and which the Court ruled upon in its July 20, 2004 Memorandum Opinion. That ruling is incorporated by reference to this case. The Court issues this Opinion, however, to address one new argument that Ms. Miller included in her Motion to Quash and asserted at the motions hearing held on September 3, 2004.

Before addressing that argument, the Court will first note that as was the case with Mr. Cooper and Mr. Russert, Mr. Fitzgerald submitted an *ex parte* affidavit filed under seal in this matter. Gov't Opp'n at 1. As previously held in the July

20, 2004 Opinion, this Court is not convinced that the DOJ guidelines vest any right in the movant in this case. Assuming, *arguendo,* that the DOJ guidelines did vest a right in Ms. Miller, this Court holds that the DOJ guidelines are fully satisfied by the facts of this case as presented to the court in the *ex parte* affidavit of Patrick Fitzgerald. Furthermore, assuming *arguendo* that this Court were to determine that Ms. Miller did possess a qualified privilege – a holding which the Court rejected in its July 20, 2004 Opinion – the *ex parte* affidavit has also established that Special Counsel would be able to meet even the most stringent of balancing tests. The information requested from Ms. Miller is very limited, all available alternative means of obtaining the information have been exhausted, the testimony sought is necessary for the completion of the investigation, and the testimony sought is expected to constitute direct evidence of innocence or guilt.

Analysis

The Court addresses here an argument offered by Ms. Miller and further supported in the brief in support of the motion to quash submitted by eighteen major news organizations and reporters' groups appearing as amici curiae in this case. Ms. Miller points to Federal Rule of Evidence 501 and the Supreme Court's ruling in *Jaffee v. Redmond,* 518 U.S. 1 (1996), for the proposition that this Court may recognize a reporters privilege based in federal common law despite its holding that *Branzburg v. Hayes,* 408 U.S. 665 (1972), establishes that there is no First Amendment or common law privilege exempting the press from testifying before a grand jury acting in good faith. Motion of Judith Miller to Quash Subpoenas and/or for Protective Order ("Miller Mot.") at 19-21.

Federal Rule of Evidence 501, enacted in 1975, states that privileges in federal criminal cases "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and ex-

perience." Fed.R.Evid. 501. By enacting Rule 501, Congress gave federal courts the authority to "continue the evolutionary development of testimonial privileges." *Trammel v. United States,* 445 U.S. 40, 47 (1980). Rule 501 provides "the courts with the flexibility to develop rules of privilege on a case-by-case basis" and" leave[s] the door open to change." *Id.* In *Jaffee v. Redmond,* the Supreme Court articulated the analysis courts should undertake when determining whether to recognize a common law privilege under Rule 501. 518 U.S. 1 (1996).

The *Jaffee* Court explained that when determining whether a privilege should be recognized, a court should begin with the fundamental maxim that the public "has a right to every man's evidence." 518 U.S. at 9. "Exceptions from the general rule disfavoring testimonial privileges may be justified, however, by a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Id.* (internal citations omitted). Accordingly, a privilege can and should be recognized under Rule 501 if that privilege "promotes sufficiently important interests to outweigh the need for probative evidence." *Id.* at 9-10. This Court acknowledges that common law testimonial privileges may be created by courts under Rule 501 and the Supreme Court's opinion in *Jaffee.*

The issue before the Court is whether it should recognize a reporters privilege under Rule 501 and *Jaffee.* Ms. Miller argues that the Court should recognize such a privilege. In arguing that because the Court *can* recognize a common law privilege it therefore *should* recognize a reporters privilege in

this case, Ms. Miller tries to jump a chasm in two leaps.[1] Although *Branzburg* was decided three years prior to the adoption of Rule 501, the *Branzburg* Court already undertook the analysis of whether the public benefit at issue "outweigh[ed] the need for probative evidence" required under *Jaffee*. *Jaffee* 518 U.S. at 9-10.

In *Branzburg*, the Court made clear what issue was before it stating, "The heart of the claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information." 408 U.S. at 681. As previously explained in the July 20, 2004 Opinion, the *Branzburg* Court concluded that the public's interest in fighting crime outweighed any burden on news gathering that would result from requiring reporters to testify before a grand jury. As the *Branzburg* Court explained:

> Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process . . . we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.

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1 *Cf.* "The most dangerous strategy is to jump a chasm in two leaps." Benjamin Disraeli, British politician (1804-1881).

Id. at 690-91.

Ms. Miller's argument that this Court should establish a common law privilege despite the balancing test already undertaken by the Supreme Court in *Branzburg* is even less convincing in light of what precisely the *Branzburg* Court was balancing. In *Branzburg*, the Court weighed an asserted First Amendment-based protection of the press against the need for probative evidence in grand juries in order to protect society from crime. To say it differently, the Court pitted a Constitutionally-based freedom of the press against society's need to fight crime, and concluded that the need to protect society from crime was more important than the burden on news gathering. Here, Ms. Miller asks the Court to repeat the same balancing test, but instead of supporting her argument with the weighty claim of First Amendment protection, she bases it on a privilege allegedly created through case law and Rule 501. The arguments in favor of protection of the press are weaker in this context, yet Ms. Miller asks this Court to come to the opposite conclusion of the Supreme Court in *Branzburg*. This Court declines to do so.

This Court holds that Ms. Miller has no privilege, based in the First Amendment or common law, qualified or otherwise, excusing her from testifying before the grand jury in this matter. Therefore, under the holding in *Branzburg* and its progeny, Ms. Miller must fulfill her obligation, shared by all citizens, to answer a valid subpoena issued to her by a grand jury acting in good faith. An appropriate order will accompany this opinion.

Sept. 9, 2004

/s/

Thomas F. Hogan

Chief Judge

ORDER

Pending before the Court is "Motion of Judith Miller to Quash Grand Jury Subpoenas and/or for Protective Order." For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that the motion is **DENIED**. It is further

ORDERED that the parties are to submit to the Court no later than Wednesday, September 15, 2004 a motion stating any and all elements of the accompanying Memorandum Opinion dated September 9, 2004 that they believe should be redacted before the Memorandum Opinion is made public and published. The motion shall explain the reasons the parties believe the identified portions should be redacted. The parties may submit a joint or individual motions for redactions. If the parties believe that no redactions are necessary, they shall notify the Court of this is writing no later than Wednesday, September 15, 2004.

SO ORDERED.

Sept. 9, 2004

/s/

Thomas F. Hogan

Chief Judge

ORDER

It is hereby

ORDERED that this Court's Order and Memorandum Opinion dated September 9, 2004 shall be unsealed.

SO ORDERED.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re: Special Counsel Investigation	:	Misc. Nos. 04-296 (TFH) 04-379 (TFH)

ORDER

Pending before the Court is the Motion of the UNITED STATES OF AMERICA, by PATRICK J. FITZGERALD, SPECIAL COUNSEL, to hold witnesses Matthew Cooper and Time Inc. in civil contempt of court pursuant to 28 U.S.C. § 1826. After conducting a hearing on October 13, 2004 and being fully advised, this Court finds as follows:

1. Matthew Cooper, having received a subpoena for grand jury testimony and the production of certain documents, moved to quash the subpoena, and this Court denied the motion to quash for the reasons stated in open court on October 7, 2004.

2. Matthew Cooper, in person and through counsel, has refused to comply with the grand jury subpoena without just cause.

3. Based on this refusal, Matthew Cooper is in civil contempt of this Court.

4. Time Inc., having received a subpoena for grand jury testimony and the production of certain documents, moved to quash the subpoena, and this Court denied

the motion to quash for the reasons stated in open court on October 7, 2004.

5. Time Inc., through counsel, has refused to comply with the grand jury subpoena without just cause.

6. Based on this refusal, Time Inc. is in civil contempt of this Court.

7. Matthew Cooper and Time Inc. have indicated their intention to pursue appeals to the United States Court of Appeals for the District of Columbia Circuit of this Court's orders finding them in contempt. These appeals are brought in good faith and raise substantial issues of law.

8. Matthew Cooper and Time, Inc. have agreed to file notices of appeal on or before October 15, 2004, and to move to consolidate these appeals with the appeal of this Court's order of October 7, 2004 finding Judith Miller in contempt of court. The parties have agreed to an expedited briefing schedule in the Court of Appeals requiring the filing of appellants' brief on October 22, 2004, the tiling of appellee's brief on November 3, 2004, and the filing of appellants' reply on November 10, 2004.

Based on the foregoing findings of fact, and for the reasons stated in open court, it is hereby

ORDERED that:

1. Matthew Cooper is ordered confined at a suitable place until such time as he is willing to comply with the grand jury subpoena. The period of confinement shall not exceed the life of the term of the grand jury, including extensions, and in no event shall exceed eighteen months.

2. Matthew Cooper is granted bail pending appeal of the court's finding of contempt to the United States Court of Appeals for the District of Columbia Circuit.

3. Time Inc. is ordered to pay a fine of $1,000 per day until such time as it is willing to comp]y with the grand jury subpoena.

4. The Court's order requiring the payment of a fine by Time Inc. is stayed pending appeal of the court's finding of contempt to the United States Court of Appeals for the District of Columbia Circuit.

SO ORDERED.

October 13, 2004

/s/

The Honorable Thomas F. Hogan

United States District Judge

APPENDIX F

United States District Court,

District of Columbia.

In re: SPECIAL COUNSEL INVESTIGATION

Nos. MISC.04-460(TJH), MISC.04-461(TFH).

Nov. 10, 2004.

MEMORANDUM OPINION

THOMAS F. HOGAN, Chief Judge.

Pending before the Court is the Motion of Matthew Cooper and Time Inc. to Quash Subpoena and/or for Protective Order. The subpoenas in question were issued by Special Counsel Patrick Fitzgerald as part of the ongoing investigation into the potentially illegal disclosure of the identity of alleged CIA official Valerie Plame. For the reasons set forth in this Court's July 20, 2004 Memorandum Opinion in the cases Misc. Nos. 04-296 and 04-297, this Court's September 9, 2004 Memorandum Opinion in the case Misc. No. 04-407, and the additional reasons stated below, the Court denies the motion to quash.

Background

The facts surrounding this case and Mr. Cooper's role in it are outlined in the Court's Memorandum Opinion of July 20, 2004. Developments in the investigation subsequent to that Opinion are the impetus behind the current motion to quash. After Mr. Cooper failed to comply with the Court's July 20, 2004 Order, Special Counsel moved for an Order to Show Cause why Mr. Cooper should not be held in contempt of court. The same day, Special Counsel served a subpoena on Time requesting production of notes, tape recordings, e-mails or other documents of Cooper's relating to articles he had contributed to or written. Motion of Matthew Cooper and Time Inc. to Quash Subpoena and/or for Protective Order ("Mot. to Quash") at 4. Time filed a motion to quash the subpoena. On August 6, 2004, the Court denied Time's motion to quash referring to its Opinion of July 20, 2004. Time did not follow the Court's Order instructing it to comply with the subpoena. On August 9, 2004, the Court held Mr. Cooper and Time in contempt of court for refusing to comply with its rulings regarding the subpoenas.

Shortly thereafter, Cooper agreed to sit for deposition and Time agreed to produce certain documents. That deposition took place on August 23, 2004. Mot. to Quash at 4. At Cooper's deposition, Special Counsel explicitly reserved the right to seek additional testimony from Cooper if the need arose. Government's Response to Motion to Quash Grand Jury Subpoenas ("Gov't Response") at 3. After Cooper's deposition and Time's production of certain documents, Special Counsel made a motion to vacate the findings of contempt against Cooper and Time, which the Court granted.

On September 13, 2004, Special Counsel issued a second set of subpoenas upon Mr. Cooper and Time. These subpoenas requested testimony and documents from Mr. Cooper and documents from Time regarding conversations between Cooper and official sources prior to July 14, 2003

regarding former Ambassador Joseph Wilson, his 2002 trip to Niger, his wife Valerie Plame, and/or any affiliation between his wife Valerie Plame and the CIA. Mot. to Quash at 6. Cooper and Time currently move to quash those subpoenas based, in part, on arguments already rejected by this Court in its July 20, 2004 Memorandum Opinion in the cases Misc. Nos. 04-296 and 04-297 and the September 9, 2004 Memorandum Opinion in the case Misc. No. 04-407. The Court incorporates the rulings in those Opinions to this case by reference. Cooper and Time raise the additional argument that the second set of subpoenas should be quashed because they are unreasonable and/or oppressive under Federal Rule of Criminal Procedure 17(c)(2). In addition to the papers filed in opposition to the motion to quash, Mr. Fitzgerald has submitted an *ex parte* affidavit filed under seal.

Analysis

Rule 17(c)(2) states that a court "may quash or modify the subpoena if compliance would be unreasonable or oppressive." Federal Rule of Criminal Procedure 17(c)(2). Cooper and Time argue that because the second set of subpoenas seek the same information requested in the original subpoenas, enforcing these new subpoenas would be unreasonable and/or oppressive. Specifically, Movants take issue with the fact that Special Counsel voluntarily limited the previous subpoenas to information concerning one identified government official, yet he now looks to gather information that he previously agreed not to seek. Such an action, Cooper and Time argue, is unreasonable and oppressive. This Court disagrees.

In his *ex parte* affidavit, Special Counsel outlines in great detail the developments in this case and the investigation as a whole. The *ex parte* affidavit establishes that the government's focus has shifted as it has acquired additional information during the course of the investigation. Special Counsel now needs to pursue different avenues in order to

complete its investigation. Through the *ex parte* affidavit, the Court has determined that the subpoenas were not issued in an attempt to harass the movants, but rather stem from legitimate needs due to an unanticipated shift in the grand jury's investigation. The subpoenas bear directly on the grand jury investigation and are of a limited time and scope.

The fact that Mr. Cooper will now be subject to two depositions, as opposed to being asked all relevant questions during the first deposition, is not indicative of unreasonable or oppressive government action. Rather, this Court believes the second round of subpoenas demonstrates quite the opposite. The fact that Special Counsel did not exhaust all relevant subject matter during Mr. Cooper's first deposition shows that Mr. Fitzgerald was proceeding in the investigation with great deference to Cooper's status as a member of the press. The Court agrees with the government when it states, "To hold that the Special Counsel waived his right to seek additional testimony by proceeding in a step-by-step fashion would create a perverse incentive for prosecutors *not* to issue narrowly tailored subpoenas to reporters." Gov't Response at 8. Furthermore, at the end of Mr. Cooper's deposition, Special Counsel specifically reserved the right to seek additional testimony if the need arose.

The Court concludes that Special Counsel has in no way violated Rule 17(c)(2), and therefore, the additional subpoenas served upon Mr. Cooper and Time shall not be quashed on those grounds. As explained in depth in previous opinions, this Court holds that Mr. Cooper and Time have no privilege based in the First Amendment or common law, qualified or otherwise, excusing them from providing documents to or testifying before the grand jury in this matter. Therefore, Mr. Cooper and Time must fulfill their obligations to answer valid subpoenas issued to them by a grand jury acting in good faith. An appropriate order will accompany this opinion.

ORDER

Pending before the Court is the Motion of Matthew Cooper and Time Inc. to Quash Subpoena and/or for Protective Order. For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that the motion is **DENIED**.

SO ORDERED.

APPENDIX G

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed April 19, 2005

No. 04-3138

In re: Grand Jury Subpoena, Judith Miller

Consolidated with 04-3139, 04-3140

Appeals from the United States District Court
for the District of Columbia
(Nos. 04mc00407, 04mc00460, (No. 04mc00461)

On Appellants' Petition for Rehearing En Banc

Before: GINSBURG, *Chief Judge*; and EDWARDS. SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL,* GARLAND,** and ROBERTS,** *Circuit Judges*

ORDER

Appellants' petition for rehearing en banc, the response thereto, and the brief of amici curiae in support of appellants have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular, active service did not vote in favor of the

petition. Upon consideration of the foregoing and the emergency motion for expedited consideration of the petition for rehearing en banc, it is

ORDERED that the petition for rehearing en banc be denied. It is

FURTHER ORDERED that the emergency motion for expedited consideration of the petition for rehearing en banc be dismissed as moot.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Deputy Clerk

* A separate statement of *Circuit Judge* TATEL concurring in the denial of the rehearing en banc is attached.

** *Circuit Judges* GARLAND and ROBERTS did not participate in this matter.

TATEL, *Circuit Judge*, concurring in the denial of rehearing en banc: Although en banc review is "not favored," Fed. R. App. P. 35(a), and although all three panel members agreed on the result in this case—i.e., that two subpoenaed reporters can be compelled to give grand jury testimony—petitioners seek reconsideration of three issues: their assertion of a common law privilege under Federal Rule of Evidence 501; their claim to First Amendment protection; and their due process challenge to the district court's use of ex parte evidence.

Regarding the common law issue, while I believe that "reason and experience," Fed. R. Evid. 501, support a qualified privilege for reporters' confidential sources, *see In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 989 (D.C. Cir. 2005) (Tatel, J., concurring), I concur in the court's denial of en banc review. Judge Henderson's opinion—which, as the narrowest supporting the result, is the controlling decision of the court—determined neither whether any common law privilege exists nor what standard would govern its application if it did. *See id.* at 981-82 (Henderson, J., concurring); *see also id.* at 976-77 (Sentelle, J., concurring); *id.* at 989-91 (Tatel, J., concurring). Hence, future panels of this court remain free to recognize any privilege (or no privilege) consistent with the result in this case, and those panels may, as necessary, clarify the standards governing reporter-source relationships. Given that the panel here agreed unanimously on the result, this particular case presents no question of "exceptional importance" in the sense required by our rule on en banc review. Fed. R. App. P. 35(a)(2).

En banc review is likewise unnecessary with respect to the First Amendment issue. True, this court's decisions interpreting *Branzburg v. Hayes*, 408 U.S. 665 (1972), are somewhat conflicted. For example, we have stated in civil litigation that "[c]ompelling a reporter to disclose the identity

of a confidential source raises obvious First Amendment problems," *Zerilli v. Smith*, 656 F.2d 705, 710 (D.C. Cir. 1981), while maintaining with respect to grand juries that "[a] newsman can claim no general immunity, qualified or otherwise," unless "questions are put in bad faith for the purpose of harassment," *In re Possible Violations of 18 U.S.C. 371, 641, 1503*, 564 F.2d 567, 571 (D.C. Cir. 1977). But factual similarities between this case and *Branzburg* prevent this court from recognizing a First Amendment privilege here. *See In re Grand Jury Subpoena*, 397 F.3d at 988 (Tatel, J., concurring). Only the Supreme Court can limit or distinguish *Branzburg* on these facts.

Finally, petitioners offer no compelling reason to reconsider the panel's ruling on the due process issue. Claiming a right to review evidence used to find them in contempt, petitioners object to the district court's and panel's reliance on ex parte submissions to determine that any conceivable privilege was overcome. But barring an absolute privilege—something no federal common law decision endorses and that *Branzburg* forecloses as a First Amendment matter—reporters either enjoy no privilege, in which case compelling their testimony requires no evidence at all, or they hold a qualified privilege, that is, a privilege subject to exceptions, much like the crime-fraud exception to the attorney-client privilege, *see, e.g.*, *United States v. Zolin*, 491 U.S. 554, 563 (1989), and the imminent-harm exception for psychotherapist-patient communications, *see Jaffee v. Redmond*, 518 U.S. 1, 18 n.19 (1996). If the privilege is qualified, then ex parte review, far from violating due process, affords a critical protection to journalists: it permits the court to demand a detailed showing by the government that it has satisfied the criteria for overcoming the privilege.

I certainly understand petitioners' preference for reviewing the evidence themselves, but given the "'indispensable secrecy of grand jury proceedings,'" *United*

States v. R. Enterprises, Inc., 498 U.S. 292, 299 (1991) (quoting *United States v. Johnson*, 319 U.S. 503, 513 (1943)), it can hardly represent an abuse of discretion for the district court to deny them that option. Telling one grand jury witness what another has said not only risks tainting the later testimony (not to mention enabling perjury or collusion), but may also embarrass or even endanger witnesses, as well as tarnish the reputations of suspects whom the grand jury ultimately declines to indict. Strong guarantees of secrecy are therefore critical if grand juries are to obtain the candid testimony essential to ferreting out the truth. *See generally In re Grand Jury Subpoena*, 397 F.3d at 973-74 (discussing reasons for grand jury secrecy). Accordingly, we have approved of ex parte review in applying the crime-fraud exception to the attorney-client privilege—a context precisely analogous to application of a qualified reporter privilege. *See id.* at 1002 (Tatel, J., concurring) (citing *In re Sealed Case No. 983077*, 151 F.3d 1059, 1075 (D.C. Cir. 1998) (per curiam)).

Attempting to manufacture a circuit conflict on this issue, petitioners cite language in *United States v. Alter*, 482 F.2d 1016 (9th Cir. 1973), and *In the Matter of Kitchen*, 706 F.2d 1266 (2d Cir. 1983), contemplating an "uninhibited adversary hearing" in civil contempt proceedings. *See Alter*, 482 F.2d at 1024; *Kitchen*, 706 F.2d at 1272. Yet neither case remotely resembles this one. *Alter* dealt with alleged illegal surveillance of discussions between a grand jury witness and his attorney, a matter requiring no review of secret grand jury materials, *see* 482 F.2d at 1024-25, and *Kitchen* involved contempt findings based on the alleged implausibility of a witness's claimed failure of memory—a situation more akin to punishment for perjury than evaluation of a privilege claim, *see Kitchen*, 706 F.2d at 1272 (identifying a need for "heightened" procedural protection "[w]hen a case is in the grey area between contempt and perjury"). Nor do petitioners' other authorities involve

compulsion of testimony due to failure of an asserted privilege. While expressing caution regarding use of secret evidence, they deal, respectively, with retraction of security clearance, punishment for false testimony, and denial of visas. *See Greene v. McElroy*, 360 U.S. 474 (1959); *In re Oliver*, 333 U.S. 257 (1948); *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 1 (1987). Unlike in those cases, the disputed evidence here relates to the government's conduct of its investigation, not the witness's own conduct. Moreover, again unlike in those cases, the reporters here face only a coercive penalty, not punishment for past actions. To avoid incarceration, they need not persuade the district judge that any accusation against them is false; they need only abandon their unlawful resistence and testify before the grand jury. *See Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 828 (1994).

The better analogy is *R. Enterprises*, where the Supreme Court approved of ex parte proceedings to determine the reasonableness of grand jury subpoenas. Although denial of a reasonableness-based motion to quash may expose witnesses to coercive measures (including incarceration) no less than denial of a claimed privilege, the Court observed that "to ensure that subpoenas are not routinely challenged as a form of discovery, a district court may require that the Government reveal the subject of the investigation to the trial court *in camera*, so that the court may determine whether the motion to quash has a reasonable prospect for success before it discloses the subject matter to the challenging party." *R. Enterprises*, 498 U.S. at 302; *cf. Abourezk*, 785 F.2d at 1061 (describing in camera review of subpoenaed evidence "for the limited purpose of determining whether the asserted privilege is genuinely applicable" as a "notabl[e]" exception to the rule against secret evidence).

In short, because none of petitioners' claims meets our high standard for reconsideration by the en banc court, I join in denying their petition.

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TO BE FILED UNDER SEAL

In re SPECIAL COUNSEL INVESTIGATION,	:	
In re GRAND JURY SUBPOENA OF MATTHEW COOPER	:	Case No. Misc. ____ (TFH)
	:	

AFFIDAVIT OF MATTHEW COOPER

DISTRICT OF COLUMBIA: ss.:

MATTHEW COOPER, being first duly sworn, deposes and says:

1. I am a White House Correspondent for *Time* magazine, which is published by Time Inc. ("Time"). I have worked for *Time* magazine as a reporter for almost five years and have been a professional journalist for approximately 20 years. I submit this affidavit in support of the motion to quash a subpoena directed at me.

2. I am fully familiar with the facts set forth herein and make this affidavit based on my personal knowledge unless otherwise stated. The exhibits attached to this affidavit are true and accurate copies of the documents cited herein.

3. I have spent my career working as an investigative journalist on a wide variety of issues, including White House and Beltway coverage. In addition to writing for *Time* magazine, I have written for *U.S. News & World Report*, *The New Republic*, *Newsweek*, *The New York Times*, *The Washington Post*, *Slate*, *George*, *The Washington Monthly*, and *Los Angeles* magazine.

4. On July 17, 2003, Time.com published an article co-authored by me entitled "A War on Wilson?". The July 17 article described Ambassador Joseph Wilson's July 6, 2003 op-ed piece in *The New York Times* criticizing the Bush Administration's claims it used to bolster its case to go to war with Iraq, as well as the Administration's reaction to the piece. The article also reported that "government officials" had noted to *Time* in interviews (as well as to syndicated columnist Robert Novak) that Wilson's wife, Valerie Plame, was "a CIA official," and that these same government officials suggested that Ms. Plame was involved in promoting Ambassador Wilson's trip to Niger to investigate reports that Saddam Hussein's government had sought to purchase large quantities of uranium ore, known as "yellowcake." The July 17 article also discussed the details of Ambassador Wilson's CIA report about his investigations in Niger, and the Administration's reaction to the information contained in that report. Attached hereto as Exhibit A is a copy of the July 17, 2003 article.

5. Prior to the publication of the July 17 article, Mr. Novak had published a July 14, 2003 article in the *Chicago Sun Times,* entitled "Mission to Niger," in which he disclosed that Wilson's wife, Valerie Plame, was a "CIA operative on weapons of mass destruction." Mr. Novak's widely syndicated article stated that "two senior administration officials told [Novak] Wilson's wife suggested sending him to Niger . . . ." I had no involvement whatsoever with Mr. Novak's July 14 article.

6. My July 17, 2003 article was written with the help of confidential sources with whom I had contact. The "government officials" I made reference to in that article provided me with information for that article on the condition that their identities not be disclosed. I would not have been able to gather and report that information and other information in the July 17 article had I not promised my sources confidentiality.

7. On July 21, 2003, *Time* magazine published an article written by Michael Duffy and James Carney entitled "A Question of Trust." Because of publication deadlines and the way *Time* dates its articles for newsstand publication, that article first appeared on Sunday, July 13. I was one of six reporters who, in addition to Messrs. Duffy and Carney, contributed some reporting to the article. The July 21 article reported on the flawed information used in President Bush's January 28, 2003 State of the Union Address — specifically, the President's discussion of Iraq's purported attempt to procure large quantities of uranium ore from Niger. Administration officials themselves claimed that the information should not have been in the Address. The July 21 article also traced the roots of the inaccurate information from evidence obtained by the Italian government that Iraq had been attempting to purchase uranium ore from Niger, to Ambassador Wilson's 2002 investigative mission to Niger to investigate these claims, to various discussions among Administration officials about support for the theory. This article did not discuss Ms. Plame or her identity as a CIA officer. Attached hereto as Exhibit B is a copy of the July 21, 2003 article.

8. Like the July 17, 2003 article that I authored, the July 21, 2003 article was based, in part, upon information gathered from confidential sources. None of that information related to Ms. Plame or her role in the CIA.

9. I have been informed that the Department of Justice has undertaken a criminal investigation in order to identify

the source or sources who leaked Valerie Plame's identity and her association with the CIA.

10. On May 21, 2004 I received a subpoena seeking my testimony before a grand jury, and the production of documents, relating to my reporting of the articles for Time.com and *Time* magazine. A copy of the subpoena is attached hereto as Exhibit C.

11. I have reviewed the subpoena and have conferred with my counsel. I have been informed that the Special Counsel expects to ask me questions seeking to lead me to set forth in detail a discussion or discussions I may have had with an individual in the Administration which would, by its nature, reveal whether that person was or was not a confidential source for my July 17 article. My review of the written materials sought by the subpoena that are in my custody or control reveals that the identities of confidential sources are also set forth in those documents.

12. Based on my years of experience as a journalist, I firmly believe that compelling reporters to testify about or otherwise reveal the identity of their confidential sources, or about their conversations with their sources, would seriously limit the ability of journalists to gather and report the news. Many of the stories I have written have been based on confidential source information. I have reported extensively for *Time's* four million-plus readers about White House policy in Iraq, the chances of passage of major legislation such as Budget and Energy Bills, and the Clinton White House. This month, I revealed to *Time's* readers and the public, in a story that gained wide notice, that President Bush displays Saddam Hussein's personal pistol as a trophy in the White House. I would not have been able to report on any of these matters — or on countless other newsworthy stories — without being able to promise confidentiality to my sources.

13. Often, promises of confidentiality are the only means of obtaining important information of public concern. Some

of the most important journalism in American history has depended on confidential sources, such as the figure identified as "Deep Throat" during the Watergate period. Without confidential sources, it would be virtually impossible to effectively investigate and report on current government issues, including government scandals. This would deprive the public of critical information.

14. Compelling journalists to testify about their conversations with confidential sources would impede the free flow of information and compromise reporters' independence and integrity. Future attempts to obtain cooperation from those or other confidential sources would be frustrated because sources would have the impression that journalists either are or can readily be converted into investigative arms of the government. Whistleblowers or confidential sources would be strongly deterred from coming forward if they knew that courts could compromise their identity by allowing prosecutors to issue subpoenas.

15. I could not effectively report on matters of concern to the public — war, peace, the budget — without using confidential sources; nor could any of my colleagues at *Time* magazine. Many newsworthy stories come to me from people — some connected with the Administration, some not — who make clear to me that they will not offer information to me unless I can promise them that their identities will remain secret. This is widely understood to be the case not just for myself but for journalists at all major publications. While I seek to attribute on a public basis quotations and other information to their sources whenever it is possible to do so, in some circumstances sources provide me with significant information only on the condition that I not disclose the source's identity. In such instances, I agree that I will not reveal the identity of the source. By promising confidentiality to such sources, I am able to report on many things that would otherwise go unreported.

16. If potential sources were to perceive me as being untrustworthy or as a reporter who is willing to break promises of confidentiality, they would likely refuse to speak to me or to provide me with important stories that I would otherwise be able to report to the public. This breach of contract would have a profoundly negative effect upon my work and the extent of my reporting, and that of my colleagues — not only at *Time* magazine, America's largest news-weekly, but at Time's many other publications and at all other news publications. If courts compel such testimony, it is hard to see why any confidential source would speak to any journalist.

17. In addition, compelling journalists to testify about their conversations with confidential sources would make journalists' promises to such sources meaningless. I take my promises and commitments seriously. If I were to inform the Government about my conversations with confidential sources or turn over documents that would reveal their identities, I would be violating my promises to those sources and the confidences placed in me by them. I take those promises very seriously and fully intend to honor them.

18. Finally, I understand that the person that the Special Counsel wishes to ask me about has signed some sort of widely-circulated form, drafted and presented to him by the Department of Justice, asking any journalist he has spoken with to cooperate with the government's investigation and not to assert any journalistic privilege. Without commenting one way or the other about whether the individual identified is a confidential source of mine (indeed, I would take the same position with regard to any potential confidential source that the government sought to compel me to answer questions about), I do not find at all persuasive the argument that any privilege I have not to testify about potential confidential sources is "waived" as a result of this signed form. Whatever may have been said publicly or privately within the government to any source of mine that may have cajoled him or her

to sign the form prepared by the government -- and I have read public statements of the President himself urging all officials to cooperate with the investigation — does not affect my promise of confidentiality to my sources in any way. I have seen and heard nothing that would relieve me of my obligation to keep the identity of any confidential source or sources secret. I do not feel at all confident that such a form, presented to individuals by their employer (or here the Attorney General and tacitly even the President himself) is not signed under extraordinary pressure. Based on two decades as a reporter, I strongly believe that if the courts enforced use of such forms, it would deter confidential sources from coming forward and would set a dangerous precedent.

19. I respectfully urge the Court to quash the subpoena in its entirety.

/s/
Matthew Cooper

Sworn to before me this
3rd day of June, 2004

/s/
Notary Public

Barbara Brincefield
Notary Public District of Columbia
My Commission Expires October 14, 2005

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TO BE FILED UNDER SEAL

In re SPECIAL COUNSEL INVESTIGATION,	:	Case Nos.
In re GRAND JURY SUBPOENA TO MATTHEW COOPER	:	Misc. ____ (TFH) and Misc.
In re GRAND JURY SUBPOENA TO TIME INC.	:	____ (TFH
	:	

AFFIDAVIT OF MATTHEW COOPER

DISTRICT OF COLUMBIA: ss.:

MATTHEW COOPER, being first duly sworn, deposes and says:

1. I am a White House Correspondent for *Time* magazine, which is published by Time Inc. ("Time"). I have worked for *Time* magazine as a reporter for more than five years and have been a professional journalist for approximately 20 years. I submit this affidavit in support of the motion to quash a subpoena directed at me.

2. I am fully familiar with the facts set forth herein and make this affidavit based on my personal knowledge unless otherwise stated. The exhibits attached to this affidavit are true and accurate copies of the documents cited herein.

3. I have spent my career working as an investigative journalist on a wide variety of issues, including White House and Beltway coverage. In addition to writing for *Time* magazine, I have written for *U.S. News & World Report*, *The New Republic*, *Newsweek*, *The New York Times*, *The Washington Post*, *Slate*, *George*, *The Washington Monthly*, and *Los Angeles* magazine.

4. On July 17, 2003, Time.com published an article co-authored by me entitled "A War on Wilson?". The July 17 article described Ambassador Joseph Wilson's July 6, 2003 op-ed piece in *The New York Times* criticizing the Bush Administration's claims it used to bolster its case to go to war with Iraq, as well as the Administration's reaction to the piece. The article also reported that "government officials" had noted to *Time* in interviews (as well as to syndicated columnist Robert Novak) that Wilson's wife, Valerie Plame, was "a CIA official," and that these same government officials suggested that Ms. Plame was involved in promoting Ambassador Wilson's trip to Niger to investigate reports that Saddam Hussein's government had sought to purchase large quantities of uranium ore, known as "yellowcake." The July 17 article also discussed the details of Ambassador Wilson's CIA report about his investigations in Niger, and the Administration's reaction to the information contained in that report. Attached hereto as Exhibit 1 is a copy of the July 17, 2003 article.

5. Prior to the publication of the July 17 article, Mr. Novak had published a July 14, 2003 article in the *Chicago Sun Times,* entitled "Mission to Niger," in which he disclosed that Wilson's wife, Valerie Plame, was a "CIA operative on weapons of mass destruction." Mr. Novak's widely syndicated article stated that "two senior administration officials told [Novak] Wilson's wife suggested sending him to Niger . . . . I had no involvement whatsoever with Mr. Novak's July 14 article.

6. My July 17, 2003 article was written with the help of confidential sources with whom I had contact The "government officials" I made reference to in that article provided me with information for that article on the condition that their identities not be disclosed. I would not have been able to gather and report that information and other information in the July 17 article had I not promised my sources confidentiality.

7. On July 21, 2003, *Time* magazine published an article written by Michael Duffy and James Carney entitled "A Question of Trust." Because of publication deadlines and the way *Time* dates its articles for newsstand publication, that article first appeared on Sunday, July 13. I was one of six reporters who, in addition to Messrs. Duffy and Carney, contributed some reporting to the article. The July 21 article reported on the flawed information used in President Bush's January 28, 2003 State of the Union Address — specifically, the President's discussion of Iraq's purported attempt to procure large quantities of uranium ore from Niger. Administration officials themselves claimed that the information should not have been in the Address. The July 21 article also traced the roots of the inaccurate information from evidence obtained by the Italian government that Iraq had been attempting to purchase uranium ore from Niger, to Ambassador Wilson's 2002 investigative mission to Niger to investigate these claims, to various discussions among Administration officials about support for the theory. This article did not discuss Ms. Plame or her identity as a CIA officer. Attached hereto as Exhibit 2 is a copy of the July 21, 2003 article.

8. Like the July 17, 2003 article that I authored, the July 21, 2003 article was based, in part, upon information gathered from confidential sources. None of that information related to Ms. Plame or her role in the CIA.

9. I have been informed that the Department of Justice has undertaken a criminal investigation in order to identify

the source or sources who leaked Valerie Plame's identity and her association with the CIA.

10. To date, I have received two subpoenas in connection with this investigation. On May 21, 2004 I received a subpoena seeking my testimony before a grand jury, and the production of documents, relating to my reporting of the July 17 and July 21, 2003 articles for Time.com and *Time* magazine. A copy of the May 21, 2004 subpoena is attached hereto as Exhibit 3.

11. My employer, Time Inc., was served with a related subpoena on August 2, 2004 seeking documents relating to my reporting of the July 17 and July 21, 2003 articles for Time.com and *Time* magazine. A copy of the August 2, 2004 subpoena of Time Inc. is attached hereto as Exhibit 4.

12. In connection with the May 21, 2004 subpoena directed at me, the Special Counsel informed me that he intended only to ask me questions concerning a discussion or discussions I may have had with an individual in the Administration who was identified by the Special Counsel, even though the scope of the subpoena was broader than that.

13. On June 4, 2004, I moved to quash the subpoena and submitted an affidavit in support of that motion. Following this Court's denial of the motion to quash, I respectfully declined to comply with the subpoena, thus permitting me to appeal the Court's Order. I was subsequently held in civil contempt and ordered imprisoned by this Court on August 9, 2004.

14. Time Inc. similarly moved to quash the subpoena directed at its documents. Following this Court's denial of Time Inc.'s motion to quash, Time Inc. respectfully declined to comply with the subpoena so that it could appeal the Court's Order. On August 9, 2004, Time Inc. was subsequently held in civil contempt and ordered by this Court to pay a $1000/day fine.

15. Soon thereafter, Time Inc. and I both filed notices of appeal with the Court of Appeals.

16. Following the entry of my notice of appeal, I reached an agreement with the Special Counsel whereby I agreed to sit for a deposition and answer all questions posed by the Special Counsel related to the particular individual previously identified by the Special Counsel as the subject of the subpoena. I chose to sit for the deposition and answer the questions on this limited topic. I did so only after receiving assurance from the identified individual that the identified individual did not object to my doing so.

17. On August 23, 2004, I was deposed and fully and truthfully answered all questions posed to me by the Special Counsel on the topics specifically identified by the Special Counsel as the basis for the subpoena. I did so in a good faith effort to comply with the Special Counsel's investigation to the extent that I could while honoring promises of confidentiality I had made to my sources. As a result of my testimony, and as a result of a motion made by the Special Counsel, this Court vacated the civil contempt judgments against both Time Inc. and me.

18. At my deposition, the Special Counsel reserved the right to subpoena me again, if necessary. I was led to believe, however, that he would not do so without good reason.

19. My testimony about what one of my sources said to me can hardly have raised for the Special Counsel for the first time the possibility that my other sources had said things of potential interest to him. The July 17, 2003 article I had co-authored was *explicit* that *"some government officials"* had *"noted to Time in interviews"* that Ambassador Wilson's wife, Valerie Plame, was a CIA official who monitored the proliferation of weapons of mass destruction. *See* Exhibit I (emphasis added). Yet now the Special Counsel seeks to subpoena me again to respond to the very questions his initial

subpoenas sought testimony about and which the Special Counsel chose to drop from those subpoenas.

20. On September 13, 2004, only days after sitting for the August 23, 2004 deposition and being advised that this Court had vacated its finding that I was in civil contempt, I was served with a second subpoena seeking my testimony again and even more documents on a broader assortment of topics. Specifically, the subpoena sought testimony "reflecting conversations between Matthew Cooper and official source(s) prior to July 14, 2003, concerning in any way: former Ambassador Joseph Wilson; the 2002 trip by former Ambassador Wilson to Niger; Valerie Wilson Plame a/k/a Valerie Wilson a/k/a Valerie Plame (the wife of former Ambassador Wilson); and/or any affiliation between Valerie Wilson Plame and the CIA." A copy of the September 13, 2004 subpoena is attached hereto as Exhibit 5. I understand that Time Inc. has been served with a second subpoena as well, seeking documents in its possession related to my reporting about these same matters.

21. Based on my years of experience as a journalist, I firmly believe that compelling reporters to testify about or otherwise reveal the identity of their confidential sources, or about their conversations with their sources, would seriously limit the ability of journalists to gather and report the news. Many of the stories I have written have been based on confidential source information. I have reported extensively for *Time's* four million-plus readers about White House policy in Iraq, the chances of passage of major legislation such as Budget and Energy Bills, and the Clinton White House. In June, I revealed to *Time's* readers and the public, in a story that gained wide notice, that President Bush displays Saddam Hussein's personal pistol as a trophy in the White House. I would not have been able to report on any of these matters — or on countless other newsworthy stories — without being able to promise confidentiality to my sources.

22. Often, promises of confidentiality are the only means of obtaining important information of public concern. Some of the most important journalism in American history has depended on confidential sources, such as the figure identified as "Deep Throat" during the Watergate period. Without confidential sources, it would be virtually impossible to effectively investigate and report on current government issues, including government scandals. This would deprive the public of critical information.

23. Compelling journalists to testify about their conversations with confidential sources would impede the free flow of information and compromise reporters' independence and integrity. Future attempts to obtain cooperation from those or other confidential sources would be frustrated because sources would have the impression that journalists either are or can readily be converted into investigative arms of the government. Whistleblowers or confidential sources would be strongly deterred from coming forward if they knew that courts could compromise their identity by allowing prosecutors to issue subpoenas.

24. I could not effectively report on matters of concern to the public — war, peace, the budget — without using confidential sources; nor could any of my colleagues at *Time* magazine. Many newsworthy stories come to me from people -- some connected with the Administration, some not — who make clear to me that they will not offer information to me unless I can promise them that their identities will remain secret. This is widely understood to be the case not just for myself but for journalists at all major publications. While I seek to attribute on a public basis quotations and other information to their sources whenever it is possible to do so, in some circumstances sources provide me with significant information only on the condition that I not disclose the source's identity. In such instances, I agree that I will not reveal the identity of the source. By promising confidential-

ity to such sources, I am able to report on many things that would otherwise go unreported.

25. If potential sources were to perceive me as being untrustworthy or as a reporter who is willing to break promises of confidentiality, they would likely refuse to speak to me or to provide me with important stories that I would otherwise be able to report to the public. This breach of contract would have a profoundly negative effect upon my work and the extent of my reporting, and that of my colleagues — not only at *Time* magazine, America's largest news-weekly, but at Time's many other publications and at all other news publications. If courts compel such testimony, it is hard to see why any confidential source would speak to any journalist.

26. In addition, compelling journalists to testify about their conversations with confidential sources would make journalists' promises to such sources meaningless. I take my promises and commitments seriously. If I were to inform the Government about my conversations with confidential sources or turn over documents that would reveal their identities, I would be violating my promises to those sources and the confidences placed in me by them. I take those promises very seriously and fully intend to honor them.

27. I respectfully urge the Court to quash the subpoena in its entirety.

/s/
Matthew Cooper

Sworn to before me this
21st day of September, 2004

/s/
Notary Public

Michelle Mackie
Notary Public, State of New York
No. 01MA6053274
Qualified in New York County
Commission Expires January 8, 2007